Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1993

QUINN-L CAPITAL CORPORATION, et al.,

Petitioners,

v.

Royal Insurance Company of America, and
Royal Lloyds of Texas,

Respondents.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is the statutorily mandated attorney-in-fact of a Texas Lloyds Plan insurer a member of that unincorporated association for diversity jurisdiction purposes given that the attorney-in-fact is the real party in controversy to this action and that a Texas statute requires it to be a Texas citizen?

2. Does a "relitigation" injunction against pending state court proceedings violate the Anti-Injunction Act when the prior declaratory judgment on which it is based is, at best, ambiguous as to the issue on which the "relitigation" injunction is based and when the parties to the prior judgment did not litigate that issue?

3. Does the Anti-Injunction Act prohibit a district court from issuing a declaratory judgment directed at a pending state court action when the declaratory judgment action itself is being used as a vehicle for creating the threshold judgment required under the Anti-Injunction Act's "relitigation" exception?

4. Can individuals who were not parties to a prior declaratory judgment be enjoined from proceeding in state court on the basis of that judgment when the district court refused to consider any evidence as to whether the individuals were in privity with parties to that judgment and when their intervention and then their substitution as parties were both denied by the court upon opposition by the party who sought and received the injunction against their state court action?

PARTIES TO THE PROCEEDING

The following are parties to the proceeding in the United States Court of Appeals for the Fifth Circuit:

Quinn-L Capital Corporation, et al., See Appendix A-60

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Petitioners pray that a Writ of Certiorari be issued to review the opinion and judgment of the Fifth Circuit Court of Appeals entered in these proceedings on September 27, 1993.

OPINIONS BELOW

The opinions of the Fifth Circuit Court of Appeals are reported at 3 F.3d 877 (5th Cir. 1993), and 960 F 2d 1286 (5th Cir. 1992) and are set forth at A-1, and A-25 of the Appendix. Petitioners timely filed a Suggestion for Rehearing En Banc, which was denied without opinion. See A-58.

JURISDICTION

The opinion of the Fifth Circuit Court of Appeals was entered on September 27, 1993. Petitioners filed a Suggestion for Rehearing En Banc, which the court of appeals' panel treated as a Motion for Rehearing in an order entered on November 5, 1993. This Petition for Writ of Certiorari was filed within ninety days of that order. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law. . . .

28 U.S.C. § 1332 provides in pertinent part:

> The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $50,000, exclusive of interest and costs, and is between –
>
> (1) citizens of different States. . . .

28 U.S.C. § 2283 ("the Anti-Injunction Act") provides:

> A court of the United States may not grant an injunction to stay proceedings in a State court except as authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

STATEMENT OF THE CASE

A. The facts

This action arose out of litigation relating to the sale and management of limited partnerships by Quinn-L Capital Corp., Quinn-L Equities Inc., Quinn-L Financial Corp., Quinn-L Management Corp., and Quinn-L Mortgage Corp., (collectively "Quinn-L"). In 1987, Petitioners, 157 investors in the partnerships ("the Investors"), brought a lawsuit against Quinn-L and others in federal court ("the federal suit") seeking to recover the value of their lost investments. Quinn-L's liability insurers, Royal Insurance Company of America and Royal Lloyds of Texas (collectively "Royal") defended Quinn-L in the federal suit, but also filed a declaratory judgment action in federal court in 1988 ("the first declaratory action") seeking a declaration that Royal was under no duty to defend or indemnify Quinn-L with respect to the lost investment allegations in the federal suit.

Because Royal did not join the Investors in the declaratory action, they moved to intervene (R. "A-5" Ex. 12), which Royal successfully opposed. (R. "A-5" Ex. 13) After thinking that they had reached a tentative agreement to settle with Quinn-L, the Investors' counsel again sought to enter the first declaratory action, this time by substituting themselves as Quinn-L's counsel of record. (R. "A-7" Ex. 32) Once again, however, Royal succeeded in excluding the Investors by opposing the motion, which the court denied. (SJExs. "3-KK" & "3-LL")

The Investors and Quinn-L tentatively agreed to a settlement in March of 1989 that called for a judgment against Quinn-L in the federal liability suit awarding the Investors $32.5 million and for Quinn-L to assign to the Investors its claims against Royal. (R. "A-7" Ex. 53) On March 17, 1989, Royal authorized Quinn-L to go forward with the proposed settlement. (R. "A-5" Ex. 33-36; "A-7" Ex. 48; "A-11" Ex. 161)

After reviewing the proposed judgment, Royal asked Quinn-L not to go forward with the settlement, stating it had just learned that the settlement included the disposition of

claims for mental anguish. (R. "A-5" Ex. 36) Royal said it never had "been provided notice of any claim or allegation of mental anguish or other personal injury," nor had it had an opportunity to evaluate the mental anguish claim. (*Id.*) Royal stated that mental anguish might be covered under the policies and demanded Quinn-L forward to it any new pleadings alleging mental anguish.[1] (*Id.*) Pursuant to Royal's request, Quinn-L did not consummate the proposed settlement.

Royal had moved for summary judgment in the first declaratory action asserting that, since the Investors' claims did not constitute "property damage" as defined in its policies, Royal owed no duty to Quinn-L in the federal liability suit. (R. "A-5" Ex. 1, pp. 5-10) On April 14, 1989, the court found that the existing complaint in the federal liability action did not allege an "occurrence," "property damage," or "personal injury" (mental anguish) as defined by the policies, and granted Royal's motion. (R. "A-5" Ex. 6)

The Investors still wanted to settle the federal liability suit with Quinn-L (R. "A-11" Ex. 166), but found themselves hampered by the absence of mental anguish claims in their earlier pleadings. (R. "A-5" Exs. 1 & 3)[2] Therefore, the Investors moved to dismiss the federal claims against Quinn-L with prejudice and the state claims without prejudice. (R. "A-5" Ex. 29) The court entered an order to that effect on August 28, 1989. (R. "A-5" Ex. 30)

On September 13, 1989, the Investors brought an action against Quinn-L in a Texas state court in Dallas County based

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[1] Royal apparently backed away from the agreed judgment because it knew that mental anguish was covered under its policies, and, therefore, it definitely would be liable for the judgment if Royal consented to it. Under the agreement, Quinn-L was to be protected from execution on any judgment entered against it. (R. "A-7" Ex. 34) Therefore, the judgment would be used only against Royal.

[2] Prior to Royal's summary judgment motion in the first declaratory action, the Investors sought leave to amend their pleadings in the federal liability suit to include allegations of mental anguish. (R. "A-5" Ex. 23) Some Defendants opposed this request and the court never ruled on it. (R. "A-5" Ex. 23) Because of the court's refusal to rule on the requested amendment, the Investors instituted the state court action to be assured of an opportunity to assert their mental anguish claims.

entirely on Texas law, pleading, for the first time, mental anguish caused by Quinn-L's negligence and gross negligence.[3] (*Id.* at p. 21) Quinn-L forwarded the new suit papers to Royal together with a demand that Royal acknowledge coverage and defend it. (R. "A-5" Ex. 39) After a forty-day delay, Royal offered to defend Quinn-L but only under a reservation of rights.[4] (R. "A-5" Ex. 43) Without prior notice to Quinn-L and obviously not believing that it could rely on the outstanding federal declaratory judgment, which related only to the already dismissed federal liability action, Royal hired C. Randal Johnston to represent Quinn-L and instructed him to answer for Quinn-L immediately, even though no answer was due. (R. Vol. 12 Ex. "B," p. 6; C-7, pp. 31-32) Johnston filed a general denial on November 17, 1989, before Quinn-L had an opportunity to reply to Royal's offer to defend only under a reservation of rights. (R. "A-7" Ex. 62)

On January 9, 1990, Quinn-L rejected Royal's qualified defense and again demanded that Royal acknowledge coverage. (R. "A-5" Ex. 45) Despite Quinn-L's rejection, Royal continued to defend Quinn-L.[5] Johnston remained in the suit for five more months as Quinn-L's attorney (R. "A-11" Ex. 152) and engaged in conduct that resulted in damage to it.[6]

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[3] The Investors amended their petition on May 4, 1990 to allege expressly damages for "bodily injury" in addition to their claim for mental anguish. (R. "A-5" Ex. 19)

[4] In its November 14, 1989 letter, Royal admitted that the issue of coverage for mental anguish had not been adjudicated in the first declaratory action. (R. "A-5" Ex. 43, pp. 4-5)

[5] This was improper because, once an insured had rejected a reservation of rights, the insurer must accept coverage or withdraw. See *Pacific Indemnity Co. v. Acel Delivery Service, Inc.*, 485 F.2d 1169, 1173 (5th Cir. 1973) (applying Texas law).

[6] The investors served 600 requests for admission on Quinn-L by serving Johnston. (R. Vol. 12 Ex. "B-8") He "answered" them within two days by denying virtually all 600. (R. Vol. 12 Ex. "B-8" p. 48; Ex. "B-10," p. 7) By denying the requests without conducting any investigation, having no knowledge of the true facts, without consulting with his clients, and acknowledging the risk of sanctions for his conduct (R. "A-5" Ex. 48; "A-8" Ex. 79; Vol. 12 Ex. "B," p. 10; C-7, p. 147), Johnston clearly violated the Texas Rules of Civil Procedure. As a result, the state

On August 7, 1990, the state court entered judgment against the five Quinn-L entities based on the deemed admissions, awarding the 157 Investors an aggregate of approximately $741 million. (R. "A-8" Ex. 90) The Investors thus became judgment creditors of Quinn-L as well as third-party beneficiaries under the Royal policies. On September 4, 1990, Quinn-L assigned its rights against Royal and others to the Investors.[7] (R. "A-6" Ex. 4) That same day, the Investors filed a state court action in Cameron County, Texas, against Royal and others both in their capacity as assignees and in their capacity as judgment creditors. (R. "A-5" Ex. 20, p. 14) As assignees of Quinn-L, the Investors seek (1) damages caused Quinn-L by Royal's tortious conduct with respect to the defense it provided Quinn-L in the Dallas County liability action and (2) indemnity under the policies. As judgment creditors, the Investors seek the insurance afforded under the Royal policies.[8] (R. "A-5" Ex. 20)

On March 9, 1990, after the district court refused Royal's request to reopen the first declaratory action,[9] Royal filed a completely new declaratory action in federal court seeking a declaration that its insurance policies did not obligate it to defend or indemnify Quinn-L in the Dallas County suit. (R.

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court granted sanctions, ordering that all the admission requests be deemed admitted. (R. "A-8" Ex. 89)

[7] Assignments like this are not uncommon or improper. See, e.g., *Foremost County Mutual Ins. Co. v. Home Indemnity Co.*, 897 F.2d 754, 755 (5th Cir. 1990) (applying Texas law); *Ranger Ins. Co. v. Rogers*, 530 S.W.2d 162, 166-67 (Tex.Civ.App. – Austin 1975, writ ref'd n.r.e.).

[8] Two weeks later, the Investors, again as both assignees and judgment creditors, also filed a declaratory judgment action against Royal in Cameron County seeking a declaration of coverage for the damages awarded by the Dallas County judgment. (R. "A-5" Ex. 21)

[9] On January 3, 1990, Royal asked the district court to reopen the first declaratory action and declare Royal's obligations under the Investors' pleadings in the Dallas County suit, including the new mental anguish allegations. (R. "A-5" Exs. 9-10) Royal acknowledged that these allegations had not been part of the first declaratory action. (*Id.*) The court refused, stating that the first action was closed and that the coverage issues "may be litigated in the current state court litigation." (SJEx. "3-FF")

001) In its complaint Royal did not seek enforcement of the first declaratory judgment nor did it plead res judicata or collateral estoppel.[10] On August 15, 1990, Quinn-L filed its answer and on September 27, 1990, Royal joined all the Investors to this second declaratory action as indispensable parties.[11] (R. Vol. 10)

On October 29, 1990, Royal, for the first time, sought a TRO to prevent the Investors from prosecuting their state court actions. (R. 769) On October 31st, the district court enjoined Quinn-L and the Investors from attempting to impose liability on Royal in any forum based on the August 7, 1990 judgment in the Dallas County proceedings.[12] (R. 929) On November 30, 1990, the district court issued a preliminary injunction on the same basis, stating in a written opinion that the "relitigation" exception to the Anti-Injunction Act gave it the authority to enjoin the state court claims seeking coverage under the policies because the first declaratory judgment allegedly decided the mental anguish coverage issue in Royal's favor, even though that judgment declared nothing more than that mental anguish had not been pleaded in the federal liability suit. (R. 1439) The court then stated that the "in aid of jurisdiction" exception to the Act authorized it to enjoin the state court claims relating to Royal's post-declaratory judgment tortious

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[10] Although the court of appeals heavily relied on the premise that Royal originally brought the second declaratory action as an action to enforce the first declaratory judgment, that premise is contradicted by the pleadings filed by Royal as reflected in the record and the fact that the district court considered the first declaratory action closed and the coverage issues litigable in the state court action. See note 9.

[11] The following day, however, Royal filed a notice of dismissal as to Professional Investors Partnership II, an Investor who had partners who were citizens of the same states as some of the underwriters of Royal Lloyds of Texas. (R. 444)

[12] At the time the court issued the TRO, the state court in Cameron County was one week away from deciding the Investors' summary judgment, which could have been dispositive of the case. (R. 2889) Thus, the state court was poised to rule on the merits of the Investors' state law claims at the time the district court enjoined them from proceeding. Additionally, the state court had already conducted hearings, made rulings, and discovery was well underway.

conduct in conjunction with the Texas state court action because an injunction was necessary to ensure that the federal court decide the claims to the exclusion of the state court. (*Id.*)

The Investors appealed, and, during the pendency of the appeal, Royal moved for summary judgment seeking a declaration that the Investors' post-first declaratory judgment tort claims, which they had sought to prosecute in their pending state court suit, were invalid. (R. 1629) The Investors sought a stay of the summary judgment motion from both the district court and the court of appeals on the ground that the summary judgment could circumvent the interlocutory appeal. (R. 1695) Royal successfully opposed the stay requests arguing that any summary judgment issued by the district court would have to be vacated in the event the injunction was vacated on appeal. (R. 1803, 1819) Despite the Investors' written opposition, the district court granted summary judgment on December 20, 1991. (R. 2647) On May 5, 1992 the court of appeals decided the preliminary injunction appeal, affirming the "relitigation exception" injunction directed to the Investors' "direct claims," under the policies, but vacating the "in aid of jurisdiction" exception injunction directed to the post-first declaratory judgment torts aspect of the "assigned claims" as violative of the Anti-Injunction Act. (A-25)

Royal then asked the district court to enter a final declaratory judgment based on the new summary judgment and to enter a permanent injunction as to both the direct and assigned claims. (R. 2695) The Investors opposed Royal's request and moved to vacate the summary judgment on the ground that the court of appeals' holding that the Anti-Injunction Act prohibited the district court from enjoining the state court litigation over the post-first declaratory judgment tort claims also prohibited the district court from entering a declaratory judgment that would have precisely the same effect as an injunction. (R. 2806) The district court once again sided with Royal and, without a hearing, denied the Investors' motion and granted both the declaratory judgment and permanent injunction. (R. 2917, 2929) The Investors appealed these orders to the Fifth Circuit Court of Appeals, which affirmed them. The Petitioners now petition this Court for a writ of certiorari.

B. The Issues Presented for Review Were Raised Below

Quinn-L and the Investors questioned the district court's subjection matter jurisdiction on numerous occasions, including by two motions to dismiss for lack of subject matter jurisdiction. (R. 74, 119, 1182, 1695, 2924) They also raised the issue both on the appeal from the preliminary injunction and on the appeal from the permanent injunction. Furthermore, this Court may review the federal court's subject matter jurisdiction sua sponte.

Quinn-L and the Investors invoked the Anti-Injunction Act as a defense to Royal's injunction requests at every opportunity. (R. 891, 1182, 2137, 2806, 2941) They also raised the Act in an attempt to have the district court stay consideration of the summary judgment motion and as a basis for denying the summary judgment as well as the requested declaratory judgment. (R. 1695, 2156, 2137) Quinn-L and the Investors also asserted the Act as a basis for vacating the injunctions and judgments in their briefing before the court of appeals in both appeals.

REASONS FOR GRANTING THE WRIT

This case presents issues of fundamental importance to this Court in that it involves a gross intrusion on a state court's ability to adjudicate pending actions raising only state law issues by a federal court lacking either the jurisdiction or the authority to do so. By applying this Court's decision in *Carden v. Arkoma Assoc.*, 494 U.S. 185 (1990) to expand rather than to limit the scope of diversity jurisdiction and construing the diversity jurisdiction statute embracively rather than strictly, the court of appeals found diversity jurisdiction where there is none and has opened the door for the enlargement of diversity jurisdiction in future cases involving unincorporated associations.

To compound the usurpation of state judicial power, the court of appeals then impermissibly expanded one of the narrowly drawn exceptions to the Anti-Injunction Act by improperly extending the scope of an admittedly ambiguous and

extremely limited declaratory judgment to justify the granting of an anti-suit injunction and then affirming an injunction based on an issue that the parties did not litigate in the prior action. All this was done in contravention of this Court's dictates in *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140 (1988), *Atlantic Coast Line R. Co. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281 (1970), and *Amalgamated Clothing Workers of America v. Richman Bros. Co.*, 348 U.S. 511 (1955). What was done below eviscerates the policy objectives of the Anti-Injunction Act – a statute that has been a bulwark of our federalism for more than two centuries – and cannot be allowed to stand. Additionally, the court of appeals' affirmance of the injunction violates the Due Process Clause of the United States Constitution by imposing a "relitigation" injunction on individuals who were not parties or in privity with parties to the prior judgment and who have never been heard on the issues decided in that proceeding.

The court of appeals' latest opinion shows how important it is for this Court to grant review of this case to provide guidance to the lower federal courts concerning the proper analysis to be applied in determining who is a member of an association for diversity jurisdiction purposes. According to the opinion below, the district courts are to ignore totally the role a party plays in the control of the association in deciding who are its members. This holding misapplies this Court's decision in *Carden* and ignores the role that the real party in interest test plays in the diversity analysis. It also represents a dangerously expansive holding that a party without whom an association could not exist and who is statutorily required to be a Texas citizen is to be ignored for diversity of citizenship purposes. Even more disturbing is that the district court exercised its improperly expanded subject matter jurisdiction to "reach down" to pending state court proceedings in order to deprive the Texas state court of its right to adjudicate issues of Texas substantive law. This improper exercise of jurisdiction cries out for proscription.

This case also presents a situation in which this Court must intervene if the Anti-Injunction Act is to have any real meaning in protecting the substance of our federalism. The

history of this litigation presents a glaring example of how an unrestrained federal district court can expand the statutory narrow exceptions so that they actually swallow the Act itself. Instead of constraining themselves to what was actually litigated and decided in the first declaratory action, the courts below exceeded the bounds of the "relitigation" exception by giving that extremely limited judgment an overly expansive "post-hoc" reading in order to enjoin issues that were not actually litigated by the parties in that first action. The district court also exceeded the bounds of the "in aid of jurisdiction" exception by enjoining state court adjudication of state law issues that could not have been litigated in the prior action because they had not yet arisen. When the court of appeals reversed that aspect of the injunction, the district court essentially changed the label on its prohibited injunction and reissued it. Knowing that it was not permitted to enjoin the state court proceedings directly in one step, this time the district court first entered a summary judgment declaring the tort claims pending before the state court to be insupportable under Texas law and then enforced its second declaratory judgment through a new anti-suit injunction, this time based on the relitigation exception. The end result is that the court of appeals now has validated an injunction that the same court earlier correctly had held violated the Anti-Injunction Act. In doing so, the court of appeals has created an unauthorized exception to the Act that threatens to encourage rather than discourage federal courts' meddling in state court proceedings through the use of declaratory judgment actions.

Additionally, the court of appeals' decision conflicts with decisions of other circuits, which limit the district courts' ability to enter a declaratory judgment after an action for affirmative relief has been commenced. See *Kidder, Peabody & Co. v. Maxus Energy*, 925 F.2d 556, 564 (2d Cir.), cert. denied, 111 S.Ct. 2829 (1991) (a district court should refrain from reaching out for issues through the vehicle of a declaratory judgment and "thereby depriving state courts of opportunities to develop and apply state law"); *Omaha Property & Cas. Ins. Co. v. Johnson*, 923 F.2d 446 (6th Cir.1991) (district court was without authority to entertain a declaratory judgment action

concerning state law issues in the face of a state court action seeking affirmative relief); *Tempco Elec. Heater Corp. v. Omega Eng'g Inc.*, 819 F.2d 746, 749 (7th Cir. 1987) (district court could not continue to hear declaratory action after the institution of an action seeking affirmative relief). Here, the district court did just the opposite of what the other courts have held; it not only entered a declaratory judgment in the face of pending state court litigation on the same state issues, it used the declaratory action as a vehicle to stop the state court litigation from proceeding and thereby violated the Anti-Injunction Act.

To compound this gross intrusion on the judicial power of the Texas state courts, the court of appeals allowed the declaratory judgment directed to the state court litigation to stand despite the fact that the judgment was entered during the pendency of the Investors' appeal from the improper preliminary injunction. The court of appeals' decision in this regard is in conflict with *Hayes Industries, Inc. v. Caribbean Sales Associates, Inc.*, 387 F.2d 498, 499-500 (1st Cir. 1968) (a district court cannot deprive the appellant of the fruits of its appeal by ruling on the merits pending an appeal of an anti-suit injunction), and *Pyrodyne Corp. v. Pyrotronics, Corp.*, 847 F.2d 1398, 1403 (9th Cir. 1988) (the filing of an appeal concerning a preliminary injunction order deprived the district court of jurisdiction to rule on issues that were before the court of appeals). If this type of intermeddling is allowed to continue, all too soon the statute's very narrow exceptions will devour the Act itself.

This Court's guidance also is necessary to prevent persons who attempted, but were not allowed to become parties to an action from being bound by the resulting judgment. This case demonstrates the lengths to which some courts will go to reach what they believe to be the most expeditious result regardless of the personal rights at stake. Before nonparties can be bound by a judgment, they have the right to a full and fair hearing on the question of whether they were in privity with any party. The lower courts' refusal to allow the Investors that right is a dangerous precedent that must be corrected so that it is not

repeated by any other federal court that is tempted to pursue the path of least resistance.

The injunction against pending state court proceedings in this case violates both the letter and the spirit of the Anti-Injunction Act. In order to prevent the inevitable friction between state and federal courts that the Act was intended to avoid, in both this case and in future cases, this Court should review the opinion of the court of appeals and once again clearly delineate the Act's boundaries. But beyond that, this case demonstrates that it is imperative that this Court make clear not only what those boundaries are, but the rules that federal courts must follow to minimize federal judicial encroachment on legitimate state judicial power. This case demonstrates that the Act can be emasculated by (1) reading the prior federal action too broadly and giving lip service to contrary principles of construction; (2) using the declaratory judgment remedy despite a pending state action; (3) using the declaratory judgment to do the work of an injunction; (4) undermining the Anti-Injunction Act by proceeding to the merits while an appeal is pending; and (5) applying a declaratory judgment to as many people as possible by ignoring plain limitations on the principles of former adjudication. In sum, this Court should speak to critically important aspects of the methodology of applying the Anti-Injunction Act.

POINT I

THE DISTRICT COURT LACKED SUBJECT MATTER JURISDICTION TO ADJUDICATE THE POST-DECLARATORY JUDGMENT CLAIMS BECAUSE COMPLETE DIVERSITY OF CITIZENSHIP WAS LACKING DUE TO THE FACT THAT THE STATUTORILY MANDATED ATTORNEY-IN-FACT FOR ROYAL LLOYDS OF TEXAS, AN UNINCORPORATED LLOYDS PLAN INSURER, IS A TEXAS CITIZEN AND MUST BE CONSIDERED A MEMBER OF THE PLAN FOR DIVERSITY PURPOSES.

The decision below reads the diversity jurisdiction statute and this Court's precedent broadly so as to expand diversity jurisdiction, rather than strictly so as to limit it as both Congress and this Court intended. The courts now are told to

ignore the role a party plays in the operation and control of an unincorporated association in determining who are members of the association and instead are instructed to rely on semantics by focusing on the label imposed on certain members by the parties rather than on their actual roles. Review of this decision is necessary since the federal courts are in need of guidance in determining who should be considered members of an association for diversity purposes.

Royal had to establish that complete diversity of citizenship existed among the parties.[13] See *Strawbridge v. Curtiss*, 3 Cranch (7 U.S.) 267 (1806). It is undisputed that Royal Lloyds, Inc., which is the statutorily mandated attorney-in-fact for Plaintiff Royal Lloyds of Texas, is a Texas citizen as are a number of Defendants. Therefore, the subject matter jurisdiction issue turns on whether Royal Lloyds, Inc.'s citizenship is to be taken into account for diversity purposes. If it is, complete diversity does not exist and the permanent injunction must be vacated.

This Court's precedents mandate consideration of Royal Lloyds, Inc.'s citizenship. Royal Lloyds of Texas is a "Lloyd's plan insurer," the formation and operation of which in Texas[14] is governed by the Texas Insurance Code. See Tex. Ins. Code Ann. §§ 18.01 et seq.[15] As an unincorporated association, the citizenship of all of its members must be considered for diversity of citizenship purposes. See *Carden v. Arkoma Assoc.*, 494 U.S. 185 (1990). The court of appeals concluded that only "underwriters" of the plan were members, citing *Carden* for the proposition that the level of control exercised by a party is irrelevant to the question of whether it is a member of the association. (A-8)

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[13] The court of appeals correctly held that the district court lacked ancillary or supplemental jurisdiction over the claims in question. (A-5-6)

[14] Lloyds associations are not peculiar to Texas; they exist in many other states as well. See generally 43 Am.Jr.2d *Insurance* § 77, pp. 156-57 (1982); 46A C.J.S. *Insurance* §§ 1711-16, pp. 697-700 (1993).

[15] The Code mandates the plan be controlled by an attorney-in-fact that must be a Texas citizen.

The court of appeals' reliance on *Carden* is misplaced and distorts this Court's holding in that case. Although it is true that in *Carden* this Court concluded that a member's lack of control over an association will not operate to render it a non-member, this Court did not hold the contrary is true – that a party's control is irrelevant to the determination of its inclusion in determining diversity jurisdiction. Indeed, this Court expressly has held that the control exercised by a party is relevant in determining whether that party is a real party in interest and, therefore, a party to be considered for diversity jurisdiction purposes. See *Navarro Savings Assoc. v. Lee*, 446 U.S. 458, 465-466 (1980); *Chapman v. Barney*, 129 U.S. 677, 682 (1889) (citizenship of joint stock corporation's president, who is the only one authorized to bring suit on behalf of the association, is relevant to diversity analysis). In holding that the trustees of a Massachusetts business trust are real parties in interest and, therefore, to be considered for diversity purposes, this Court in *Navarro* stressed:

> They have legal title; they manage the assets; they control the litigation. In short, they are the real parties to the controversy.

446 U.S. at 465. Certainly, if trustees of a business trust are considered real parties in interest in litigation concerning the trust, as *Navarro* holds, they are also members of the association for diversity purposes.

Applying that same analysis to a Lloyd's plan insurer leads to the conclusion that the attorney-in-fact is every much a real party in interest as was the trustee in *Navarro* and, therefore, a member of the Lloyds association. Under both the Texas Insurance Code and the Restated Articles of Agreement through which Royal Lloyds of Texas exists, the attorney-in-fact has legal title, controls the association's assets, and controls the litigation. Under Articles IV and V of the Restated Articles of Agreement, the underwriters contributed to the attorney-in-fact a fund of $325,000 to be used in the operation of the business as the attorney-in-fact saw fit. Article VI provides not only that the attorney-in-fact control the plan's business, but that it does so on behalf of **both** the

underwriters **and itself**.[16] Article XII makes clear that the attorney-in-fact is the only entity that had the authority to authorize its counsel to prosecute the declaratory actions on behalf of Royal Lloyds of Texas.

A Lloyd's association can issue insurance in Texas only by and through its Texas attorney-in-fact.[17] *Grace v. Rahlfs*, 508 S.W.2d 158, 161 (Tex.Civ.App. – El Paso 1974, writ ref'd n.r.e.). As the court held in *Grace*, the attorney-in-fact "for all practical purposes took the place of the insurers." *Id.* Indeed, the attorney-in-fact even has greater liability than the underwriters. See *Lloyd's of London v. Walker*, 716 S.W.2d 99, 102-03 (Tex.App. – Dallas 1986, writ ref'd n.r.e.) (the attorney-in-fact is liable to the claimant for the policy's full amount). Thus, not only is it an underwriter, which in and of itself makes it a member of the association for diversity purposes, it is in effect a "super underwriter."

It must be remembered that both declaratory actions were brought in the name of Royal Lloyds of Texas and not in the names of the individual underwriters. Because the attorney-in-fact is the only one who could bring this action in the association's name, the attorney-in-fact is the real party in interest and its citizenship must be considered for diversity purposes.[18]

Taking account of the attorney-in-fact's Texas citizenship is entirely consistent with the apparent purpose underlying diversity jurisdiction – to reduce the possibility of discrimination against a "foreign" litigant by state courts. See *Guaranty*

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[16] Because the attorney-in-fact operates the association's business on its own behalf and has personal liability for the policies it writes, it is much more than a mere agent or employee.

[17] The attorney-in-fact is an essential part of Lloyds associations in states other than Texas. See, e.g., Ill.Ann.Stat. ch. 215, § 5/86 (Smith-Hurd 1993); N.J.Stat.Ann. § 17:47-3 (West 1985); N.Y. Ins. Law § 107(29) (McKinney 1985); Okla.Stat.Ann. tit. 36, § 3002 (West 1990); Pa.Cons.Stat.Ann. tit. 40, § 933 (1992).

[18] Because the attorney-in-fact has a beneficial interest in the outcome of this litigation, it is not merely a nominal party. See *Mecom v. Fitzsimmons Drilling Co.*, 284 U.S. 183, 186-87 (1931); 13B C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure: Jurisdiction 2d § 3606, at 418 (1984).

Trust Co. v. York, 326 U.S. 99, 111 (1945). Since the attorney-in-fact is the entity that controls Royal Lloyds of Texas and is the only party that could bring the present action on behalf of Royal Lloyds of Texas, and thus is the only member of the association visible in the state, it is logical to consider its citizenship. To look only to the "invisible" individuals to the exclusion of the "visible" member is inconsistent with the purposes behind diversity jurisdiction and the strict construction to be given the statute. See *Thomson v. Gaskill*, 315 U.S. 442, 446 (1942) (policy of the diversity jurisdiction statute calls for its strict construction). Royal Lloyds, Inc. is an integral part of Royal Lloyds of Texas and, as such, must be considered a member for diversity purposes.[19] See generally *Betar v. DeHavilland Aircraft of Canada, Ltd.*, 603 F.2d 30, 35-36 (7th Cir. 1979), cert. denied, 444 U.S. 1098 (1980) (the diversity jurisdiction statute should be construed in light of its underlying purpose to prevent potential local prejudice against nonresidents); *Stifel v. Hopkins*, 477 F.2d 1116, 1125-26 (6th Cir. 1973) (diversity jurisdiction determination should emphasize physical facts of a party's situation tending to result in local prejudice). Inasmuch as Texas law requires the Lloyds plan insurer to be domiciled in Texas, it makes absolutely no sense to permit Royal Lloyds of Texas to invoke diversity jurisdiction in a suit against Texas citizens.

The court of appeals' decision to ignore the attorney-in-fact under the rationale that the control a party exercises is irrelevant leads to a broader application of diversity jurisdiction than that intended by Congress and by this Court in *Carden*. It also reveals a significant point of confusion arising over the interrelationship between *Carden* and *Navarro*. Only this Court can police the boundaries of federal subject matter jurisdiction to shore up the limitations set out in Article III of the Constitution and by Congress in the diversity statute. Additionally, the issue of situs of those exercising control

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[19] In essence, a Lloyds plan insurer is akin to a limited partnership. See *Couch on Insurance*, 2d (Rev. Ed.), § 74:273 (1983). As such, the attorney-in-fact is no different from a general partner and, as such, must be considered for diversity jurisdiction purposes.

over an association has in determining diversity jurisdiction is one likely to reoccur in the context of unincorporated associations.[20]

POINT II

THE DECISIONS OF THE DISTRICT COURT AND THE COURT OF APPEALS THREATEN TO EMASCULATE THE ANTI-INJUNCTION ACT BY ENJOINING PENDING STATE COURT PROCEEDINGS ON THE BASIS OF AN ISSUE THAT THE PARTIES TO AN EXTREMELY LIMITED AND ADMITTEDLY AMBIGUOUS DECLARATORY JUDGMENT DID NOT ACTUALLY LITIGATE AND THAT WAS NOT DECIDED UNDER THE EXPRESS TERMS OF THE JUDGMENT.

The decision below demonstrates the ever present danger that district courts will continue to apply the narrow exceptions to the Anti-Injunction Act, 28 U.S.C. § 2283, expansively to interfere with pending state court litigation in violation of the Act's underlying policies. Thus, this Court must be vigilant in policing the lower courts' application of the Act and continue to set forth rules governing the Act's exceptions.

It is difficult to overstate the importance of the Anti-Injunction Act to our federalism. The Act, which has served us well for the past 200 years, is "an absolute prohibition against enjoining state court proceedings unless the injunction falls within one of three specifically defined exceptions." *Atlantic Coast Line R. Co. v. Brotherhood of Locomotive Engineers,* 398 U.S. 281, 286 (1970). As such, it stands as much more than a principle of comity; rather, it is a binding rule limiting the power of the federal courts. *Id.* at 286-87. Thus, the Act "is not a statute conveying a broad general

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[20] Other such associations include Lloyd's plans in other states (controlled by an attorney-in-fact), reciprocal insurance associations (controlled by an attorney-in-fact), limited liability partnerships (controlled by a managing partner), and various unincorporated churches (controlled by bishops, other clergy, or boards of directors).

policy for appropriate *ad hoc* application." *Amalgamated Clothing Workers of America v. Richman Bros. Co.*, 348 U.S. 511, 515-16 (1955).

As this Court has held, the bar against enjoining state proceedings is grounded in "the fundamental Constitutional independence of the States and their courts." *Atlantic Coast Line*, 398 U.S. at 288. Recently, this Court described the Act as:

> a necessary concomitant to the Framers' decision to authorize, the Congress' decision to implement, a dual system of federal and state courts. It represents Congress' considered judgment as to how to balance the tensions inherent in such a system. **Prevention of frequent federal court intervention is important to make the dual system work effectively.**

Chick Kam Choo v. Exxon Corp., 486 U.S. 140, 146 (1988) (emphasis added). The courts below seem to have ignored this Court's direction that "proceedings in state courts should normally be allowed to continue unimpaired by intervention of a lower federal court, with relief from error, if any, through the state appellate courts and ultimately this Court."[21] *Atlantic Coast Line*, 398 U.S. at 287.

Although the Act contains three exceptions,[22] they are strict and narrow; they cannot "be enlarged by loose statutory construction." *Chick Kam Choo*, 486 U.S. at 146. Indeed, this

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[21] As the record demonstrates, the district court preoccupied itself with the procedural course and merits of the state court proceedings instead of concentrating on a proper application of the Act itself. (TR. of 10-31-90, pp. 5, 17, 27). Indeed, the true root of the district court's concern appeared to be with the size of the Dallas County judgment. (*Id.* at p. 22). That judgment, however, was against Quinn-L and not Royal. Additionally, Royal would have had every opportunity to raise the same defenses in the Texas state courts that it raised in its summary judgment motions against the Investors in this action. Clearly, the courts below did not trust the Texas state courts.

[22] The three exceptions permit an injunction against a state court proceeding only when: (1) expressly authorized by Act of Congress; (2) necessary in aid of the federal court's jurisdiction; or (3) necessary to protect or effectuate the federal court's judgments – the so-called "relitigation" exception.

Court made clear their extremely limited application when it held:

> Any doubts as to the propriety of a federal injunction against state court proceedings should be resolved in favor of permitting the state courts to proceed in an orderly fashion to finally determine the controversy. The explicit wording of Section 2283 itself implies as much, and the fundamental principle of a dual system of courts leads inevitably to that conclusion.

Atlantic Coast Line, 398 U.S. at 298.

Resolving doubts against an anti-suit injunction is especially important in the context of the relitigation exception. The test for determining its application is whether the **precise** issue whose litigation is in question **actually** was litigated in the federal proceedings. See *Chick Kam Choo*, 486 U.S. at 148. This test is strictly and narrowly applied by determining from the record what the earlier federal judgment actually said; the court will not be permitted "to render a *post hoc* judgment as to what the order was **intended** to say." *Id.* (emphasis in original).

The courts below employed a dramatically opposite rule of construction and, by doing so, have violated the Act's sound principles and departed from this Court's precedents. When the relitigation exception is analyzed properly in the context of this case, it is clear that the Investors' state court suits against Royal in no way seek to relitigate or undermine the September 8, 1989 federal declaratory judgment. They are based on materially changed circumstances, different issues, and brought by persons who were not parties to the first declaratory action. Royal's first declaratory action merely sought a declaration that it had no duty to defend or indemnify Quinn-L for the Investors' then-present lost investment allegations in the federal liability suit. (R. "A-6" Ex. 16) The district court made its determination based on Royal's summary judgment motion. In their briefing, the parties disagreed as to, among other things, whether the Investors had pleaded mental anguish as damages. Royal claimed that mental

anguish had not been alleged and Quinn-L argued that it had. (R. "A-5" Ex. 4, pp. 7-8; "A-5" Ex. 3, p. 9)

The district court, agreeing with Royal, held that the "present allegations in the pending suits do not allege . . . 'personal injury' as defined by the policies." (R. "A-5" Ex. 7, p. 2) Since the umbrella insurance policy defines "personal injury" as, among other things, mental anguish, the court necessarily held that the then pending suits did not allege mental anguish. (R. 572) The court in its final judgment again found no allegations of mental anguish in the Investors' "pending" federal liability suit. (R. "A-5" Ex. 8) In short, the court's decision gave Royal exactly the declaration it had requested the court to award – but that applied only to the then pending federal liability action and to nothing else.

The Investors thereafter filed suit against Quinn-L in a Texas state court and the Investors did what the district court had held in the declaratory-action, at Royal's insistence, they had not done in the federal liability action: They alleged mental anguish and bodily injury caused by Quinn-L's negligence and gross negligence.[23] This new suit, with its new allegations, was not within the judgment in the first declaratory action since that judgment only covered Royal's duty to defend a prior suit that did not allege mental anguish or bodily injury. See *Rhodes v. Chicago Ins. Co.*, 719 F.2d 116, 119 (5th Cir. 1983) (a complaint that does not initially create a duty to defend, may be amended so as to give rise to such a duty). Therefore, the first declaratory judgment, which by its terms only declared Royal's obligations with respect to the allegations in the superseded complaint in the dismissed federal liability action did not control the issue of whether

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[23] The new pleadings also added causes of action to those alleged against Quinn-L in the federal liability suit, including new allegations of general negligence, negligent breach of fiduciary duties, negligent misrepresentation, and negligent conspiracy. These new allegations were significant because negligence constitutes an "accident" or "occurrence" as a matter of law. See *Massachusetts Bonding & Ins. Co. v. Orkin Exterminating Co.*, 416 S.W.2d 396, 400 (Tex. 1967).

Royal's policies covered the new allegations in the Texas state court action.[24]

Any "lingering doubts" as to the scope of what actually was litigated in the first declaratory action is resolved by Royal's conduct with respect to it. See *Atlantic Coast Line*, 398 U.S. at 292. Royal's behavior shows that, until it sought the injunction below, it consistently acted for over one year as if the first declaratory action did not adjudicate whether negligently caused mental anguish is covered by the policies. On numerous occasions, Royal represented to both the district court and Quinn-L that the first declaratory judgment did not determine Royal's obligations to Quinn-L arising from the new allegations in the Dallas County action. (R. 004, 135; "A-5" Exs. 9, 10, 36, 43) If Royal actually believed the first action decided the issue, it would not have defended Quinn-L or filed the second declaratory action, which would be nothing more than a completely superfluous reaffirmation of the first declaratory action. Indeed, if Royal did anything, it would have sought only enforcement of the first declaration.

In violation of the Act, both the district court and the court of appeals ignored the basic principles of construing the scope of a declaratory judgment and Royal's pattern of behavior. In the Anti-Injunction Act context, the judgment must be clear about the issues actually litigated; doubts must be resolved against an injunction; and the parties' conduct is relevant. *Atlantic Coast Line*, 398 U.S. at 291, 298. At the very least, the wording of the first declaration, which clearly spoke only to the allegations in the pending federal liability action, and Royal's actions concerning it raise considerable doubt whether the coverage issues of mental anguish and

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[24] In the context of insurance coverage declaratory judgment actions involving pending litigation, the resulting declarations have a very limited, transitory utility. See, e.g., *Green v. Aetna Ins. Co.*, 349 F.2d 919, 926-27 (5th Cir. 1965) (recognizing that declaratory relief concerning an insurer's duty to indemnify can be problematic when based on the pleadings, which are subject to change). That being so, it would be especially improper in the anti-suit injunction context to enlarge a declaratory judgment *post hoc*, particularly when a state court can decide these critical state law issues.

accident were litigated. If Royal, the party who requested and drafted the judgment, did not believe it declared its duty to defend the new allegations, then the judgment clearly was ambiguous and, therefore, cannot support an anti-suit injunction.[25]

Thus, the court of appeals' opinion violates many of the protective restrictions this Court has announced to assure the viability of the Anti-Injunction Act. Instead of limiting the prior judgment to its express terms and resolving doubts against application of the relitigation exception, the courts below gave the judgment an expansive, "*post hoc*" reading and resolved **admitted** ambiguities in favor of the injunction. This violation of the Act not only impacts this case by inevitably creating friction between the Texas state courts and the federal courts,[26] it also represents a significant breech in the Act's protective shield that threatens to widen should other courts, both within and without the Fifth Circuit, follow the court of appeals' lead. The Anti-Injunction Act is too central an element in our federalism to tolerate this potential for mischief. Only review by this Court can seal the fissure created below.

POINT III

THE DECLARATORY JUDGMENT AND CORRESPONDING INJUNCTION AGAINST PENDING STATE COURT PROCEEDINGS ENTERED UNDER THE GUISE OF THE "RELITIGATION" EXCEPTION VIOLATE THE ANTI-INJUNCTION ACT BECAUSE THEY HAVE THE SAME EFFECT OF ENJOINING PROPERLY

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[25] The district court recognized the ambiguous nature of its first declaratory judgment when it excused Royal's repeated representations concerning the judgment's scope as simply being a mistaken interpretation of the judgment and when it stated in its order refusing to reopen the first declaratory action that the insurance coverage issues could be litigated in state court. (R. 1072; SJEx "3-FF")

[26] This court has recognized that an injunction against pending state court proceedings will **inevitably** lead to friction between the state and federal courts. See *Chick Kam Choo*, 486 U.S. at 146, quoting *Vendo Co. v. Lektro-Vend Corp.*, 438 U.S. 623, 630-31 (1977) (plurality opinion).

INSTITUTED STATE COURT ACTION AS DID THE PRIOR "IN AID OF JURISDICTION" INJUNCTION, WHICH THE COURT OF APPEALS PREVIOUSLY CORRECTLY VACATED AS VIOLATING THE ACT, AND THIS COURT SHOULD GRANT REVIEW AND REJECT THIS DEVICE FOR CIRCUMVENTING THE ACT.

The decision below permits a district court to entertain a declaratory judgment directed at pending state court litigation when the declaratory judgment action is being used as a vehicle for creating the threshold judgment required by the "relitigation" exception. This practice must be proscribed by this Court if the Act is to be maintained as the pillar of federalism that the Founders intended and the precedents of this Court declare it to be instead of a mere formality to be circumvented through clever procedural maneuvering.

The key to understanding this issue as it arises in the present action is to recall that the Investors brought two different classes of claims against Royal in the Cameron County state court suit. The first class of claims ("contract claims") are those dependent on a showing that the damages awarded in the Dallas County state court judgment were covered, at least in part, by the Royal insurance policies. These claims include breach of contract and indemnity under the policies. The second class of claims ("tort claims") are those that arise from Royal's conduct after the entry of the first declaratory judgment and are not dependent on whether the damages awarded in the state court judgment are covered by the insurance policies. These claims include, among others, negligence, waiver, and estoppel.

The district court's preliminary injunction enjoined the contract claims under the "relitigation" exception to the Act and enjoined the tort claims under the "in aid of jurisdiction" exception. The court of appeals ultimately held that the injunction directed to the tort claims violated the Act because the "in aid of jurisdiction" exception did not apply to claims arising after the federal court had concluded the first declaratory judgment action. During the pendency of the Investors'

interlocutory appeal from the preliminary injunction, however, the district court granted Royal a summary judgment declaring the Investors' tort claims, which were not properly before it and already pending in the state court proceedings, unsustainable as a matter of law.[27] The district court then issued a permanent injunction using both the previously issued one involving Royal's duty to defend in the dismissed federal liability action and the new declaratory judgment directed to the pending state court litigation as the basis for invoking the relitigation exception.

The court of appeals affirmed the permanent injunction, thus allowing the district court to enjoin the same state court proceedings on the after-arising tort claims through a subsequently instituted federal declaratory action that the court of appeals earlier had held the Anti-Injunction Act prohibited the court from enjoining directly. In so holding, the court of appeals treated the prohibition against intruding upon pending state court proceedings by way of a declaratory judgment merely as a matter of abstention or comity. (A-16) But this holding flies in the face of this Court's precedents construing legislation indistinguishable from the Anti-Injunction Act.

In *California v. Grace Brethren Church*, 457 U.S. 393 (1982) this Court held that the Tax Injunction Act, 28 U.S.C. § 1341[28] prohibits a district court from issuing a declaratory judgment finding state tax laws unconstitutional. This Court stated:

> [B]ecause there is little practical difference between injunctive and declaratory relief, we would be hard

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[27] The Investors asked both the district court and the court of appeals to stay consideration of the summary judgment motion pending the interlocutory appeal. Royal, however, successfully opposed the stay motions, arguing that no harm could be done by proceeding with the summary judgment motion because the Anti-Injunction Act would require vacation of the summary judgment should the preliminary injunction be reversed. Royal conveniently and shamelessly retreated from that position after the court of appeals reversed the preliminary injunction.

[28] Section 1341 provides:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

> pressed to conclude that Congress intended to prohibit taxpayers from seeking one form of anticipatory relief against state tax officials in federal court while permitting them to seek another thereby defeating the principal purpose of the Tax Injunction Act. . . . "

Id. at 408. Thus, this court has recognized that declaratory relief is the functional equivalent of injunctive relief. See also *Samuels v. Mackell*, 401 U.S. 66, 72-73 (1971) (if an injunction against a pending state court criminal prosecution would be improper, declaratory relief also should be denied). This Court should now grant review to make clear that the principal enunciated in *Grace Brethren Church* applies equally to the Anti-Injunction Act. When a declaratory judgment would have the same practical effect on a pending state court action as would an injunction, declaratory relief is improper if the Anti-Injunction Act would prohibit an injunction against the state court action.

Curiously, the court of appeals sitting en banc in *Texas Employers' Ins. Ass'n v. Jackson*, 862 F.2d 491 (5th Cir. 1988), cert. denied, 490 U.S. 1035 (1989) properly held that the Act applied to declaratory judgments as well as injunctions; in this case the same court seems to have lost its way. Instead of examining the declaratory judgment in the context of the prohibition of the Anti-Injunction Act, the court of appeals chose to examine it in the context of principles of comity. In so doing, the court of appeals affirmed an injunction entered in violation of the Anti-Injunction Act and created a sleight-of-hand technique that can be used by other courts to circumvent the Act's important objectives unless this Court makes clear that the practice employed below is impermissible. The Anti-Injunction Act is designed to minimize, not maximize, intrusion on pending state court litigation, particularly when that litigation is based on state law, which means that the bootstrapping use of a declaratory action practiced below must be excised from the litigator's bag of tricks.

Furthermore, by validating the use of a declaratory action to circumvent the Anti-Injunction Act, the decision below is

in conflict with the decisions of at least two other courts of appeals, which have held that a federal declaratory action should give way to proceedings in which affirmative relief is sought. See *Omaha Property & Cas. Ins. Co. v. Johnson*, 923 F.2d 446 (6th Cir. 1991) (district court was without authority to entertain a declaratory judgment action concerning state law issues in the face of a state court action seeking affirmative relief); *Tempco Elec. Heater Corp. v. Omega Eng'g Inc.*, 819 F.2d 746, 749 (7th Cir. 1987) (district court could not continue to hear declaratory action after the institution of an action seeking affirmative relief). Thus, other circuits have recognized that the utility of a declaratory action is greatly outweighed by its potential to disrupt pending litigation once an action is commenced seeking affirmative relief, especially when the affirmative claim involves state law issues pending before a state court. In this case, however, the court of appeals allowed a declaratory action to be used solely as a vehicle to preempt pending state court proceedings seeking affirmative relief under state law. This Court's direction is needed by the lower courts to resolve this conflict.

Both the district court and the court of appeals found that Royal brought this second action as a suit to enforce the first declaratory judgment.[29] (A-12) Ironically, even if this is true, which it is not, once these courts concluded that the first declaratory judgment decided all coverage issues, nothing was left for the district court to declare by way of a second declaratory judgment. Indeed, the court of appeals recognized that the district court was not required to adjudicate the issues raised in Royal's summary judgment motion in order to rule on the permanent injunction request when it held that the court lacked ancillary jurisdiction over the post-first declaratory judgment tort claims. In light of this, there was nothing before the district court with respect to the "affirmative defenses." There was absolutely no legitimate reason why the district court should have proceeded to adjudicate those issues

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[29] As shown above, this simply is not accurate; Royal did not seek enforcement of the first declaratory judgment until more than seven months after bringing this action. See note 10.

by way of declaratory judgment since they were already pending before a Texas state court in an action for affirmative relief. The only conceivable reason it did so was an impermissible one – to prevent the state court from doing so. The district court's preemptive action violated the absolute prohibition of the Anti-Injunction Act and cannot be justified under some alleged notion of comity. See *California v. Grace Brethren Church*, 457 U.S. 393 (1982); *Kidder, Peabody & Co. v. Maxus Energy*, 925 F.2d 556, 564 (2d Cir.), cert. denied, 111 S.Ct. 2829 (1991).

In *Kidder, Peabody & Co.*, the district court entered a declaratory judgment relating to issues pending in a Texas state court action for affirmative relief and then issued an anti-suit injunction prohibiting litigation of the state court action based on the declaratory judgment. The Second Circuit reversed the declaratory judgment and the injunction, holding that the district court should have refrained from reaching out for issues "thereby depriving state courts of opportunities to develop and apply state law." 925 F.2d at 564. The Fifth Circuit's decision in this case stands in sharp conflict with the Second Circuit's decision.

The district court's aggressiveness in this case is particularly offensive since it raced forward to enter the declaratory judgment while the state court proceedings were under an injunction subsequently determined to violate the Act. It is also incompatible with precedent in the First Circuit. In *Hayes Industries, Inc. v. Caribbean Sales Associates, Inc.*, 387 F.2d 498 (1st Cir. 1968), the district court had issued an injunction precluding the defendant from pursuing a state court action purportedly under the "in aid of jurisdiction" exception. *Id.* at 501. While the defendant's interlocutory appeal of the injunction was pending before the First Circuit Court of Appeals, the federal district court set the merits of the case for trial. *Id.* at 499. In order to protect its jurisdiction over the interlocutory appeal, the First Circuit entered an order vacating the lower court's order setting the case for trial. *Id.* at 500. In doing so the court recognized that one of the issues before it on appeal was whether both the federal and state courts should be allowed to proceed simultaneously

and that the lower court would effectively render that issue moot should it proceed with the merits of the case while the injunction was in place. *Id.* at 499-500.

The Investors complained at every possible juncture of the impropriety of hearing the summary judgment during the pendency of an appeal from a blatantly improper injunction, but were still denied the fruits of their interlocutory appeal."[30] This Court should resolve the important methodological conflict between the Fifth and the First Circuits by declaring the importance of preserving the viability of an Anti-Injunction Act challenge pending appeal.

POINT IV

THE ANTI-SUIT INJUNCTION AGAINST THE INVESTORS, WHO POSSESSED CLAIMS AGAINST ROYAL INDEPENDENT OF THE CONTRACT CLAIMS OBTAINED FROM QUINN-L BY ASSIGNMENT, VIOLATES THEIR DUE PROCESS RIGHTS BECAUSE THEY WERE NOT PARTIES TO THE PRIOR JUDGMENT AND WERE NOT AFFORDED ANY MEANINGFUL HEARING ON THE ISSUE OF WHETHER THEY WERE IN PRIVITY WITH QUINN-L.

The court of appeals compounded its other violations of the Anti-Injunction Act by affirming the injunction preventing the Investors from asserting their "direct claims" in state court in spite of the fact that they were not parties to the first declaratory judgment. The Investors, who have a direct cause of action against Royal as judgment creditors and were not parties to the first declaratory action,[31] have a due process

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[30] Indeed, the district court probably lacked jurisdiction to enter the summary judgment while the Investors' interlocutory appeal was pending since the summary judgment had the potential to and essentially rendered moot the "in aid of jurisdiction" aspect of the appeal. See *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982); *Pyrodyne Corp v. Pyrotronics Corp.*, 847 F.2d 1398, 1403 (9th Cir. 1988).

[31] At Royal's request, the district court twice denied the Investors' attempts to join the first declaratory action, making it somewhat ironic that it now presses the claim that the Investors are bound by that proceeding.

right to their own day in court to litigate all coverage issues. See *Martin v. Wilks*, 490 U.S. 755, 761 (1989). The prior judgment cannot have any preclusive effect on the non-party Investors absent privity with Quinn-L. *Benson & Ford, Inc. v. Wanda Petroleum Co.*, 833 F.2d 1172, 1174 (5th Cir. 1987). See also *Burton v. State Farm Mutual Automobile Ins. Co.*, 335 F.2d 317, 325 (5th Cir. 1964) (declaratory judgment not binding on judgment creditors who were not joined); *Dairyland County Mutual Ins. Co. v. Childress*, 650 S.W.2d 770, 774 (Tex. 1983) (prior declaratory judgment against insured could not operate as collateral estoppel as to non-joined claimants who have a direct right of action).

In granting summary judgment, the district court did not pass on the merits of Royal's argument that the Investors were virtually represented by Quinn-L in the first declaratory judgment. Indeed, the court refused to consider the Investors' evidence on the privity issue. (R. 2923) Rather, the court merely stated that it already had decided that issue in conjunction with the preliminary injunction. (R. 1068) Findings made in the context of a preliminary injunction, however, do not constitute final findings and are not binding at the trial on the merits. See *University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981). This is axiomatic because preliminary injunctions typically are heard on an expedited basis and do not usually afford a litigant a constitutionally sufficient opportunity to be heard. *Id.* Therefore, litigants are entitled to a full and fair hearing on the merits of the issues before the issuance of a permanent injunction.

In affirming the district court's "finding," the court of appeals simply concluded that the district court properly granted summary judgment on the issue. Thus, the court of appeals ignored both the summary judgment evidence, which raises a factual dispute on the privity issue, and the fact that the district court **never addressed the issue on the merits** – its preliminary injunction determination is not a surrogate for the Investors' constitutional right to a day in court on the privity question. *Id.* If this Court does not review the propriety of cavalierly treating the Investors as bound by the first declaratory judgment, they will have been deprived of their

due process rights in two respects – (1) they will have been enjoined based on a judgment to which they were not parties; and (2) they will have been held to be in privity without a full hearing on the merits of that fact issue.

Since the injunction against the Investors' "direct claims" was issued without an opportunity to be heard on whether they were properly bound by the first declaratory judgment action, the injunction violates their due process rights. See *Martin*, 490 U.S. at 761. It is important to correct this blatant denial of the Investors' fundamental constitutional rights by granting review to enforce the principles enunciated in *Martin*. But beyond that, what happened below makes it clear that this Court should elaborate on its decision in *Martin* to help the lower courts understand the type of process that must be accorded a litigant before he or she can be bound on an issue that arises in the context of a preliminary ruling and then resurfaces in the context of a decision on the merits or with regard to a permanent relief – a phenomenon that occurs in a wide variety of contexts other than that presented in this case.

CONCLUSION

For the reasons stated, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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February 3, 1994

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-1808

ROYAL INSURANCE COMPANY OF AMERICA
and
ROYAL LLOYDS OF TEXAS,

Plaintiffs-Appellees,

VERSUS

QUINN-L CAPITAL CORPORATION, et al.,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Texas

(Filed Sept. 27, 1993)

Before WISDOM, DAVIS, and SMITH, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

The facts of this case are set forth in *Royal Ins. Co. of Am. v. Quinn-L Capital Corp.*, 960 F.2d 1286 (5th Cir. 1992) ("*Royal I*"). Following remand in *Royal I*, the district court entered final judgment against defendant *Quinn-L Capital Corp.* ("Quinn-L"), granting summary judgment in favor of plaintiffs Royal Insurance Company of America and Royal Lloyds of Texas (collectively, "Royal") and entering a permanent injunction that barred Quinn-L and the defendant investors from relitigating any of the claims or

issues decided in either this declaratory judgment action or the first declaratory judgment action.

I.

Quinn-L argues that the federal courts do not have jurisdiction for three reasons. First, Quinn-L contends that the district court did not have ancillary jurisdiction over the affirmative defenses of waiver, estoppel, and negligence. Second, Quinn-L contends that no diversity jurisdiction exists. Third, Quinn-L asserts that the district court had no jurisdiction to grant summary judgment while an appeal was pending before this court.

A.

In *Royal I*, we recognized that the district court had ancillary jurisdiction to issue an anti-suit injunction to protect or effectuate its prior judgments. 960 F.2d at 1292. Quinn-L argues that the district court lacked jurisdiction to grant summary judgment on the waiver, estoppel, and negligence claims because those claims are outside the scope of the first declaratory judgment action. Royal contends that we held in the first action that the district court had ancillary jurisdiction over the entire controversy and that this holding is law of the case.

Before addressing the merits of the jurisdictional argument, we must decide whether law of the case principles apply to appeals of preliminary injunctions. We decide that issue here because Royal relies upon the law of the case doctrine in addressing numerous points of

error raised by Quinn-L. Quinn-L argues that the doctrine has no application in preliminary injunction proceedings.

The law of the case doctrine was developed to "maintain consistency and avoid [needless] reconsideration of matters once decided during the course of a single continuing lawsuit." 18 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4478, at 788 (1981). "These rules do not involve preclusion by final judgment; instead, they regulate judicial affairs before final judgment." *Id.* Under this doctrine, we will follow a prior decision of this court without reexamination in a subsequent appeal unless "(i) the evidence on a subsequent trial was substantially different, (ii) controlling authority has since made a contrary decision of the law applicable to such issues, or (iii) the decision was clearly erroneous and would work manifest injustice." *North Miss. Communications v. Jones*, 951 F.2d 652, 656 (5th Cir.), *cert. denied*, 113 S. Ct. 184 (1992). The doctrine extends to those issues "decided by necessary implication as well as those decided explicitly." *Dickinson v. Auto Ctr. Mfg. Co.*, 733 F.2d 1092, 1098 (5th Cir. 1983) (citation, quotation marks, and emphasis omitted).

We disagree with Quinn-L's suggestion that law of the case principles have no application to an interlocutory appeal of the granting of a preliminary injunction. As in any other interlocutory appeal, our decision constitutes law of the case. 1B JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 0.404[4.___7], at II-37 (2d ed. 1993). Obviously, the doctrine extends only to matters actually decided. *Id.* at II-37 to II-38. As to decisions of law, the interlocutory appeal will establish law of the case.

As to factual determinations, however, an interlocutory appeal of a preliminary injunction often will not establish law of the case. To obtain a preliminary injunction, the movant need only show a substantial likelihood of success on the merits. We review a district court's findings of fact supporting the grant of a preliminary injunction for clear error. *Royal I*, 960 F.2d at 1297. Because the standard of review for factual determinations on direct appeal is higher than the standard applied during an interlocutory appeal of a preliminary injunction, the interlocutory appeal normally will not establish law of the case on factual matters.

Contrary to Quinn-L's suggestion, however, the reason this result does not obtain is not because law of the case principles are inapplicable. Rather, the lesser standard of review applied during an appeal of a preliminary injunction necessarily means that the factual issues differ from those on direct appeal. Such a difference often will result only from the higher standard of review applied during the direct appeal.

With this background in mind, we now address Royal's contentions that we previously held that the district court had ancillary jurisdiction over the entire controversy and that this alleged holding is law of the case. In *Royal I*, we held that the district court has "ancillary jurisdiction over the present controversy." 960 F.2d at 1292. Read in context, this means that we held only that the district court had ancillary jurisdiction to issue an anti-suit injunction under the "protect or effectuate its judgments" exception to the Anti-Injunction Act (the "Act"), 28 U.S.C. § 2283 (1988). 960 F.2d at 1299. We also held that the district court should have limited the scope

of that injunction to exclude the claims that arose after the first declaratory judgment action. *Id.*

In other words, we held that the district court had ancillary jurisdiction to issue an injunction but that the Act bars a portion of the injunction. We did not have to decide, and did not decide, the jurisdictional issue as to the claims of waiver, estoppel, and negligence, as Quinn-L obtained a reversal on the merits as to those claims.[1] Here, the jurisdictional issue is squarely presented, and we must decide it.

We conclude that the district court did not have ancillary jurisdiction to address the waiver, estoppel, and negligence claims. As noted above, the district court has ancillary jurisdiction[2] to protect or effectuate its judgments. This jurisdiction extends no further than necessary to achieve that purpose. But "[w]hile . . . the . . . Act is not a grant of jurisdiction, no independent basis of jurisdiction is required for a federal court to entertain an application to enjoin relitigation in state court. The jurisdiction that the federal court had when it entered its original

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[1] It is uncertain whether it was proper for us to pretermit the jurisdictional issue in *Royal I* while reversing the preliminary injunction as to the waiver estoppel and negligence claims. Because of our holding today on diversity jurisdiction, we need not address this.

[2] What was referred to formerly as "ancillary jurisdiction" is now included within the category of "supplemental jurisdiction." *See* Pub. L. No. 101-650, 104 Stat. 5113 (codified at 28 U.S.C.A. § 1367 (West Supp. 1993)). The amendment applies only to actions filed on or after December 1, 1990, so it is inapplicable to the instant case.

judgment is enough to support its issuance of an injunction." *Mooney Aircraft Corp. v. Foster (In re Mooney Aircraft)*, 730 F.2d 367, 374 (5th Cir. 1984) (citing 17 WRIGHT ET AL., *supra*, § 4276, at 345 (1978)).

In *Mooney*, we noted that where a bankruptcy court seeks to enjoin claims that were not encompassed in a prior judgment, no ancillary jurisdiction exists. 730 F.2d at 374. Under *Mooney*, the district court must have an independent basis for jurisdiction over Quinn-L's waiver, estoppel, and negligence claims, as those claims were not raised in the prior declaratory judgment proceeding and are not barred by that proceeding under res judicata principles.

Thus, we agree with Quinn-L that ancillary jurisdiction extends no further than the scope of the first judgment. The basis for allowing the federal courts to exercise ancillary jurisdiction in issuing anti-suit injunctions is to allow them to protect their prior judgments; where new claims are involved, the policy basis for ancillary jurisdiction disappears. We therefore conclude that ancillary jurisdiction to issue anti-suit injunctions normally will not allow a federal court to exercise jurisdiction over new claims not addressed in the judgment the court is seeking to protect.[3]

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[3] Of course, if the first action bars the new claims because of res judicata principles, ancillary jurisdiction exists as to those claims.

B.

Next, we must decide whether diversity jurisdiction exists in this case. Royal is an unincorporated association that sells insurance under a so-called "Lloyd's plan." For purposes of ascertaining whether the federal courts have diversity jurisdiction, an unincorporated association is considered to have the citizenship of its members. *Carden v. Arkoma Assocs.*, 494 U.S. 185, 195-96 (1990). This case turns on the question of who constitutes a "member" of a Lloyd's plan insurance association. None of the underwriters is a citizen of Texas, while at least one attorney in fact is a resident.

A Lloyd's plan insurer consists of a group of underwriters who join together to issue insurance through an attorney in fact or other representative. TEX. INS. CODE ANN. §§ 18.01-02 (West 1981). Ordinarily, such insurers provide insurance for risks for which American insurance companies otherwise would not issue policies. ROBERT E. KEETON & ALAN I. WIDISS, INSURANCE LAW § 2.1(a)(1) (West 1988) (practitioner's ed.). Under the Lloyd's plan, the insured typically obtains insurance from one or more members of the Lloyd's group; each member accepts responsibility for a portion of the risk, and liability among the members is several but not joint. *Jones v. Hollywood Style Shop*, 62 S.W.2d 167, 167 (Tex. Civ. App. ___ San Antonio 1933, no writ); KEETON & WIDISS, *supra*, § 2.1(a)(1). In other words, the individual member is responsible only for the portion of the risk that it chooses to insure.

The Lloyd's group underwriters appoint an attorney in fact to act for them under a power of attorney. TEX. INS.

CODE ANN. § 18.01-1 (West 1981). The attorney in fact has the power to issue policies of insurance, "authorized by and acting for such underwriters. . . . " *Id.* The attorney in fact is "in effect the chief executive and managing agent of the enterprise. . . . " *Grace v. Rahlfs*, 508 S.W.2d 158, 161 (Tex. Civ. App. ___ El Paso 1974, writ ref. n.r.e.).

Quinn-L contends that the attorney in fact is akin to a general partner of a general partnership and that the underwriters are akin to limited partners. We do not find the analogy relevant to our inquiry, as the degree of control exercised by an individual over an entity is irrelevant to the question of whether he is a member of the entity. *Carden*, 494 U.S. at 192.

Analogies to other types of state-created entities likewise are not especially helpful. The only relevant inquiry is the identification of the members of *this* particular entity. Normally, we should examine an entity's definition of "member." Here, such an inquiry is unnecessary, as the relationship of the attorney in fact to a Lloyd's group is described by statute.

We agree with Royal that the attorney in fact is not a member of a Lloyd's group insurance association; only underwriters are members of the organization. As noted above, the attorney in fact acts as an *agent* for the Lloyd's group. *Grace*, 508 S.W.2d at 161. Under Texas law, the attorney in fact must be authorized by the underwriters to execute insurance polices and *acts for* those underwriters by so doing. TEX. INS. CODE ANN. § 18.01-1 (West 1981). Moreover, the attorney acts under powers of attorney from the underwriters, *id.*, who also dictate, in the articles of agreement, where the principal office of all

attorneys will be, *id.* § 18.02. Thus, for purposes of determining whether diversity jurisdiction exists, we conclude that the members of a Lloyd's group are the underwriters alone.[4]

Because attorneys in fact are not members of Lloyd's plan insurance associations, we look only to the citizenship of the underwriters to determine whether diversity jurisdiction exists. Here, because none of the underwriters is a Texas citizen, complete diversity exists.

C.

Finally, we must consider Quinn-L's contention that the district court lacked jurisdiction to grant summary judgment while the interlocutory appeal in *Royal I* was pending. A district court loses jurisdiction over all matters validly before a court of appeals. *Dayton Indep. Sch. Dist. v. U.S. Mineral Prods. Co.*, 906 F.2d 1059, 1063 (5th Cir. 1990). The district court does not have the power to "alter the status of the case as it rests before the Court of Appeals." *Id.* Quinn-L argues that the summary judgment determined a matter within our jurisdiction.

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[4] Our conclusion is not altered by the fact that Texas law requires that the Lloyd's group appoint a resident of Texas as an attorney in fact if it wishes to issue insurance policies in Texas. *See* TEX. INS. CODE ANN. § 18.02 (West 1981). Texas could have required one or more underwriters to be a resident of the state but chose only to require the attorney in fact to be a resident. Texas's election to require an association to employ an agent within the state to conduct the association's business does not make the agent any more or less an agent.

This case does not fall within the scope of *Dayton*, a case in which the district court made a ruling that mooted an interlocutory appeal. In other words, the district court's action interfered with our jurisdiction to decide the issues before us. Here, the district court's continuing jurisdiction during the pending interlocutory appeal did not interfere with our ability to decide the issues presented in *Royal I*. Accordingly, the district court had jurisdiction to enter summary judgment.

II.

Quinn-L argues that the declaratory judgment and permanent injunction must be vacated because they violate the Act, which provides as follows: "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U.S.C. § 2283 (1988). The Act is "an absolute prohibition against enjoining state court proceedings unless the injunction falls within one of [the] three specifically defined exceptions." *Atlantic Coast Line R.R. v. Brotherhood of Locomotive Eng'rs*, 398 U.S. 281, 286 (1970). The Court also has warned that "the exceptions should not be enlarged by loose statutory construction." *Id.* at 287.

Here, the district court rendered a declaratory judgment on the waiver, negligence, and estoppel claims and enjoined defendants from proceeding therewith in state court. On its face, then, this judgment falls squarely within the "protect or effectuate its judgments" exception

to the Act. We have stated, however, that "[i]f an injunction would be barred by § 2283, this should also bar the issuance of a declaratory judgment that would have the same effect as an injunction." *Texas Employers' Ins. Ass'n v. Jackson*, 862 F.2d 491, 506 [5th Cir. 1988] (en banc) (citation and quotation marks omitted), *cert. denied*, 490 U.S. 1035 (1989). Quinn-L argues that because we held in *Royal I* that the Act barred the preliminary injunction as to the waiver, estoppel, and negligence claims, *Jackson* necessarily bars the declaratory judgment and permanent injunction on those claims.

In *Jackson*, the plaintiff sought relief under the Longshore and Harbor Workers' Compensation Act (LHWCA) using the normal administrative process. Before that process was complete, he sued his employer's LHWCA insurer in state court, alleging, *inter alia*, deceptive trade practices, fraud, bad faith, and intentional infliction of emotional distress. The insurer filed a plea in bar asserting LHWCA preemption. The state court denied the petition, and extensive discovery was conducted. Later, the insurer filed a declaratory judgment action in federal court seeking an injunction against prosecution of the state court suit.

The district court granted the injunction on the basis of the "protect or effectuate its judgments" exception to the Act. The panel reversed and barred the grant of injunctive relief but allowed the declaratory judgment to stand. *Texas Employers' Ins. Ass'n v. Jackson*, 820 F.2d 1406 (5th Cir. 1987). The en banc court held that the declaratory judgment was invalid as well, because it was "plain that the *only* purpose and effect of TEIA's federal suit was to defeat Jackson's state suit against it and to, in effect,

overrule the state trial court's denial of TEIA's plea in bar." 862 F.2d at 491. Expressing our concern over the apparent attempt to interfere with a state proceeding, we observed that "[t]o allow declaratory relief in these circumstances would be to transform section 2283 from a pillar of federalism reflecting the fundamental constitutional independence of the states and their courts, to an anachronistic, minor technicality, easily avoided by mere nomenclature or procedural sleight of hand." *Id.*

As we noted above, we stated in *Jackson* that if "an injunction would be barred by § 2283, this should also bar the issuance of a declaratory judgment that would have the same effect as an injunction." 862 F.2d at 506. Our inquiry here then depends upon the resolution of two issues. First, we must decide whether the Act would prevent the federal courts from issuing an injunction under the facts of this case. If it would not, then *Jackson* does not apply. Second, if an injunction would be barred, we must decide whether *Jackson* is distinguishable.

To decide whether the Act would bar an injunction on the waiver, estoppel, and negligence claims, we must address a question that is *res nova* in this circuit. Quinn-L injected these claims into the federal proceedings *before* it had filed any state court actions on these claims. In other words, Royal filed a declaratory judgment action seeking an anti-suit injunction prior to the commencement of any state proceedings. Before a state court suit is filed, the Act has no application, and a federal court may enjoin parties from ever filing suit in state court. *Jackson*, 862 F.2d at 507 (citing 17 WRIGHT ET AL., *supra*, § 4222, at 506-07 (1988)).

A circuit split exists on the question of whether the Act has any application where the injunction is sought before a state suit has been filed but is not issued until after a state suit was filed. Three circuits have adopted the rule that the Act does not apply where the federal suit is filed first. *See Barancik v. Investors Funding Corp.*, 489 F.2d 933, 937 (7th Cir. 1973); *National City Lines v. LLC Corp.*, 687 F.2d 1122, 1127 (8th Cir. 1982); *Hyde Park Partners, L.P. v. Connolly*, 839 F.2d 837, 842 n.6 (1st Cir. 1988). Two circuits, on the other hand, have held that the Act should be applied to the case as it stands, regardless of the order in which the actions were filed. *Roth v. Bank of the Commonwealth*, 583 F.2d 527, 533 (6th Cir. 1978), *cert. dismissed*, 442 U.S. 925 (1979); *see also Standard Microsystems Corp. v. Texas Instruments*, 916 F.2d 58, 61-62 (2d Cir. 1990) (disapproving of the reasoning in *Barancik*)).

The leading case holding that the Act does not apply when the federal suit is filed first is *Barancik*, in which the court reasoned that the Act does not apply because the applicability of the Act should be determined at the time the federal court's injunctive powers are invoked. 489 F.2d at 937. The court was concerned that otherwise a litigant could defeat a well-founded motion for an anti-suit injunction by filing a suit in state court. *Id.* The thrust of this reasoning is weakened, however, by the fact that a federal district court often issues a temporary restraining order (TRO) against filing a state court suit while it is considering a motion for a preliminary injunction seeking such relief. Such an action goes a long way to avoid the danger raised by the *Barancik* court.

The *Barancik* court felt that using TRO's would encourage the liberal granting of the kind of protective

orders that the statute was designed to prevent. We also disagree with this analysis, which assumes the district court will decide the issue wrongly and that granting a TRO will prejudice the decision on the merits. Such logic proves too much, as no TRO would be justified under this reasoning. Although the issuance of a TRO should not be automatic and is subject to, *inter alia*, the requirements of FED. R. CIV. P. 65(b),[5] the TRO is a useful tool where appropriate.

The *Barancik* court, moreover, held that the Act *does not apply* where the federal suit is filed first. In this class of cases, then, *Barancik* eviscerates the statutory bar against antisuit injunctions. The *Barancik* court also expressed concern that the court might have to take action without notice to the opposing party. We find this

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[5] Rule 65(b) reads in relevant part as follows:

> A temporary restraining order may be granted without written or oral notice to the adverse party or that party's attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or that party's attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting the claim that notice should not be required. Every temporary restraining order granted without notice shall be indorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice. . . .

reasoning to be questionable as well, as it assumes that district courts will ignore the requirements of rule 65(b).

We subscribe to what we think is the better view – that the Act applies regardless of when the federal and state suits were filed. The plain language of the statute contains no exception for a situation in which the federal suit was filed first. As the *Roth* court notes, 583 F.2d at 533, the Supreme Court has held that the statute provides an absolute prohibition on injunctions unless one of the three exceptions applies.

The Court repeatedly has emphasized that those exceptions are exclusive and that federal courts may not craft new ones. Any doubts should be resolved in favor of denying the injunction. *Roth*, 583 F.2d at 533 (citing *Atlantic Coast Line R.R.*, 398 U.S. at 286-87). Given the Court's consistently narrow interpretation of the Act, the presumption in favor of denying an injunction, and the absence of language in the statute suggesting that its application depends upon the time of filing of the state suit, we think Roth provides the better analysis. We conclude, therefore, that the Act applies whenever a state suit is pending, regardless of when it was filed.

Because the Act applies even when the federal suit is filed first, we now must address Quinn-L's contention that our holding in *Jackson* mandates reversal here. Royal argues that because the federal suit was filed first in this case, *Jackson* is distinguishable and hence is not controlling here.[6] To resolve this question, we return to policy concerns underlying our decision in *Jackson*.

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[6] We reject Quinn-L's suggestion that Royal is judicially estopped from claiming that *Jackson* does not apply to the facts

At oral argument, the parties characterized *Jackson* as a new type of abstention. We agree with this characterization, as no language in the Act or the Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2202 (1982), specifically commands the result in *Jackson*.[7] As we recently recognized, our decision in *Jackson* was based upon principles of federalism and comity. *Travelers Ins. Co. v. Louisiana Farm Bureau Fed'n*, 996 F.2d 774, 776 (5th Cir. 1993).[8]

In *Jackson*, the federal suit offended principles of comity and federalism because the plaintiff sought an overruling of a state court decision on LHWCA preemption. 862 F.2d at 505. Here, Royal has not attempted to interfere with the state courts. Instead, it sued to enforce a prior federal judgment, and Quinn-L injected new state claims into the federal action. Royal sought relief in federal court nearly six months before the state actions against Royal were filed. Moreover, significant proceedings took place during that time, including the filing of Royal's original and amended complaints, the filing of Quinn-L's answer, and the district court's consideration

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of this case. Royal merely offered a legal *opinion* regarding *Jackson's* application. As Royal properly argues, a statement of opinion on the law does not create a judicial estoppel. *Sturm v. Boker*, 150 U.S. 312, 336 (1893).

[7] *See* ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 12.1, at 593 (1989) ("The term *abstention* refers to judicially created rules whereby federal courts may not decide some matters before them even though all jurisdictional and justiciability requirements are met.").

[8] *See also Garrett v. Hoffman*, 441 F. Supp. 1151, 1155-56 (E.D. Pa. 1977) (declaratory judgment should be barred only where judgment would lead to unseemly interference with state court litigation).

and denial of two motions for dismissal based on the lack of jurisdiction. The only interference results from the potential for a race to judgment.[9]

Where the federal case is filed substantially prior to the state case, and significant proceedings have taken place in the federal case, we perceive little, if any, threat to our traditions of comity and federalism. *See Moses H. Cone Hosp.*, 460 U.S. at 21-22 (fact that substantial proceedings have occurred is a relevant factor to consider in deciding whether to abstain). In fact, by filing a state suit after a federal action has been filed, the state plaintiff can be viewed as attempting to use the state courts to interfere with the jurisdiction of the federal courts. We agree with Royal that if we were to hold that *Jackson* applied in this scenario, litigants could use *Jackson* as a sword, rather than a shield, defeating federal jurisdiction merely by filing a state court action. Neither *Jackson* nor the concerns underlying it mandate such a result.

Citing *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 238 (1984), Quinn-L argues that abstention doctrines apply regardless of when the state suit is filed. *See also Hicks v. Miranda*, 422 U.S. 332, 349 (1975). We find this contention flawed for two reasons. First, Quinn-L mischaracterizes *Midkiff*. There, the Court noted that if substantial proceedings have occurred in federal court, that court need not abstain. 467 U.S. at 238. In other words, in

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[9] A race to judgment often is condoned. *See Moses H. Cone Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 15 (1983) (approving of parallel proceedings in all but exceptional circumstances); *PPG Indus. v. Continental Oil Co.*, 478 F.2d 674, 677 (5th Cir. 1973) (citing *Kline v. Burke Constr. Co.*, 260 U.S. 206, 230 (1922)).

some cases the date on which the state court suit was filed can make a difference in the application of the abstention doctrine. Where substantial proceedings have begun, the federal court is allowed to proceed to prevent the state from employing abstention as a means to delay litigation.

Second, we find other types of abstention distinguishable. For example, in the case of *Younger*[10] abstention, the Court was concerned with federal court interference with a state's ability to function. By blocking proceedings involving state governments, federal courts could interfere unduly with the state's ability to govern. These federalism concerns are implicated no matter when the federal and state suits are filed: A state's ability to conduct proceedings is compromised if the officials conducting those proceedings are involved in discovery in federal court.

In *Jackson*, on the other hand, the filing of the federal suit demonstrated an attempt to overrule a decision by a state trial court. Federalism and comity concerns arose only because a litigant attempted to use the federal courts to interfere with ongoing state court proceedings. Thus, while the time of filing of the federal and state suits is irrelevant to the application of the Act, it can be an important consideration in determining whether to abstain under *Jackson*.

We conclude, however, that federal courts need not abstain from declaratory judgment actions under *Jackson* where the federal suit is filed substantially prior to any

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[10] *Younger v. Harris*, 401 U.S. 37 (1971).

state suits, significant proceedings have taken place in the federal suit, and the federal suit has neither the purpose nor the effect of overturning a previous state court ruling. We recently characterized the rule in *Jackson* as applying only where "a declaratory defendant has *previously* filed a cause of action in state court against the declaratory plaintiff." *Travelers*, 996 F.2d at 776 (emphasis added). Even where the state court suit is filed first, a class of exceptions to the *Jackson* rule exists. *Id.* at 776-79. Our decision today, declining to extend the rule to a case in which the federal suit has been the subject of significant proceedings before the state suit is even filed, comports with the policy concerns that prompted our decision in Jackson.[11]

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[11] The investors also argue that we should not give effect to the federal district court's declaratory judgment under the circumstances of this case, even though the federal court's judgment was rendered first. This is because, the investors argue, the federal court injunction prevented the state court from reaching judgment first.

The district court rendered its summary judgment on December 20, 1990, about 3½ months after the investors filed their state court actions on September 4, 1990. The state court set a tentative trial date for December 10 but, given the complexity of this action, we find it extremely unlikely that the state court could have tried this case and rendered judgment before December 20. We are persuaded, therefore, that the state court would not have entered judgment before the December 20 judgment of the federal district court, even if the federal court's October 30, 1990, injunction had not issued. Accordingly, we need not decide, in this case, whether the possibility that the state trial and judgment would have occurred first could be relevant under other circumstances.

III.

Quinn-L next contends that Royal was collaterally estopped from pursuing the second declaratory judgment action because it originally sought to reopen the first declaratory judgment action by filing a motion on January 3, 1990. In the February 28, 1990, order denying the request to reopen the first action, the district court stated the following: "Because this case has been closed and the issues may be litigated in the current state court litigation, the Court DENIES the Motion." Quinn-L argues that this order is determinative with respect to the forum in which the coverage issues are to be decided.

Quinn-L cites *New Orleans Pub. Serv. Co. v. Majoue*, 802 F.2d 166 (5th Cir. 1986), for that proposition. In *Majoue*, the defendant removed a state court suit, but the district court remanded it. The defendant later filed a federal declaratory action directed to the state claims. We stated that the original order remanding the case was "res judicata as to the forum." *Id.* at 168.

We find *Majoue* distinguishable. A decision to remand to state court may not be appealed, and the district court may not later change its mind. *Id.* at 167. In *Majoue*, we relied upon the language of 28 U.S.C. § 1447(d) (1988), which states that a remand order is not reviewable on appeal or *otherwise*. By filing a declaratory judgment action, the party was attempting to attack the district court's remand order collaterally, an action that is prohibited by statute.

Here, on the other hand, the declaratory judgment is not an attempt to attack the prior order collaterally, nor does any statute prohibit the action. Moreover, as Royal

argues, *Majoue* involved an attempt to evade a final judgment. Here there is no final judgment that could have any res judicata effect. We reason, accordingly, that the February 28, 1990, order does not collaterally estop Royal from pursuing this matter.

IV.

We next address Quinn-L's contention that the declaratory judgment and injunction must be vacated because the investors were not parties to the first declaratory judgment and because *Royal I* is not preclusive on the issue of coverage for negligently caused mental anguish and bodily injury. Royal argues that our decision in *Royal I* is law of the case as to both issues. Quinn-L disagrees and also argues that our decision was clearly erroneous.[12]

First, Quinn-L claims that the investors are not bound by the first declaratory judgment because they were not in privity with Quinn-L. We disagree with Royal's contention that *Royal I* establishes as law of the case that the investors were in privity with Quinn-L. As we noted in *Royal I*, the issue of privity is a question of fact for the trial court. 960 F.2d at 1297. Because the appeal was interlocutory, we reviewed that finding only for clear error. *Id.* Here, on the other hand, we review the district court's findings *de novo*, because that court has

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[12] We reject Quinn-L's contention that it did not have a full and fair opportunity to litigate these issues. *See Allen v. McCurry*, 449 U.S. 90, 95 Quinn-L had more than adequate representation and ample opportunity to litigate the coverage question.

rendered summary judgment. As we discussed above, law of the case may not be established on issues of fact where a later appeal involves a more demanding standard of review.

Reviewing the district court's decision *de novo*, we affirm. There is no material issue of fact as to privity, and the district court properly held that Quinn-L is the investors' virtual representative.

Second, Quinn-L contends that our *Royal I* decision was clearly erroneous on the question of the scope of the first declaratory judgment. Here, we agree with Royal that our prior holding is law of the case, and we will not set it aside unless it is "clearly erroneous and would work manifest injustice." *North Miss. Communications v. Jones*, 951 F.2d 652, 656 (5th Cir.), *cert. denied*, 113 S. Ct. 184 (1992). The res judicata effect of a prior judgment is an issue of law that depends upon an interpretation of the court's opinion. *See Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 148 (1988). Our decision in *Royal I* establishes a finding of law on the scope of the first declaratory judgment. In this situation, an interlocutory appeal establishes law of the case.

Nor do we perceive a reason to revisit *Royal I*. Quinn-L argues that in *Royal I* we ignored the requirement that an issue must be actually litigated and decided for issue preclusion to apply. *See Jackson*, 862 F.2d at 500. Quinn-L contends that the question of whether an accident had occurred was not litigated.

The term "occurrence" is defined in the policies as "an accident . . . which results in bodily injury or property damage. . . . " Quinn-L contends that a finding of no

"occurrence" by the district court could mean either (1) that the pleading does not allege an "accident" or (2) that the accident alleged in the pleading is not alleged to have caused either "property damage" or "bodily injury." We agree with Quinn-L's characterization of a finding of "no occurrence": That finding could have either meaning.

Quinn-L goes on to contend that we assumed in *Royal I* that the first declaratory judgment determined that there had been no accident. Quinn-L argues that this issue was never litigated in the first declaratory judgment action. We disagree.

The district court made separate findings in the first declaratory judgment action, to the effect that the pleadings do not allege an "occurrence," "property damage," or "personal injury" as defined by the policies. If the finding of no occurrence does not constitute a finding that no accident occurred, there would have been no need to enter a separate finding that no property damage or personal injury had occurred. The only reasonable reading of the first declaratory judgment opinion is that the court decided both that there was no accident and that no property damage or personal injury had occurred.[13]

Moreover, this allegation actually was litigated. In its motion for summary judgment, Royal requested that the court make separate findings that no "occurrence" had been alleged and, additionally, that no "personal injury"

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[13] *See also Royal I*, 960 F.2d at 1295 nn. 10, 11 (discussing footnote 3 of partial summary judgment opinion, which acknowledged mental anguish as personal injury but still concluded that such injury was not caused by an "occurrence").

or "property damage" had been alleged. Again, if Royal was seeking to litigate only the absence of personal injury or property damage, it would not have needed to ask for both findings.

In addition, Quinn-L's counterclaim placed the issue of whether an "occurrence" was alleged before the district court. The district court obviously felt that the issue was before it, as it concluded that despite the allegation of mental anguish (an injury Royal conceded would be covered), no "occurrence" had been alleged. Finally, Quinn-L contends that we erred in *Royal I* by ignoring the "actually decided" requirement for collateral estoppel. Quinn-L claims that the issue of coverage for mental anguish was not "actually decided" by the court in the first declaratory judgment action. We disagree. As we explained in *Royal I*, the district court expressly indicated that any mental anguish was not caused by an occurrence within the meaning of the policy. 960 F.2d at 1295 & nn. 10, 11. The court did actually decide the issue.

V.

Essentially for the reasons given by the district court, we agree that no material issue of fact exists as to the claims of waiver, estoppel, and negligence, and we affirm the district court's grant of summary judgment on those claims. We find Quinn-L's claim that the district court should have recused itself to be completely without merit and therefore affirm on that issue.

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 90-7038
No. 90-7070

ROYAL INSURANCE COMPANY OF AMERICA and
ROYAL LLOYDS OF TEXAS,

Plaintiffs-Appellees,

VERSUS

QUINN-L CAPITAL CORPORATION, et al.,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Texas

(Filed May 5, 1992)

Before WISDOM, DAVIS, and SMITH, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

The district court enjoined the appellants from pursuing their suit in state court; the appellants contend that the injunction violates the Anti-Injunction Act ("the Act"), 28 U.S.C. § 2283. We find that the portion of the injunction based upon the "relitigation" exception to the Act was proper. We further find that the portion of the injunction based upon the "in aid of jurisdiction" exception was improper. We therefore affirm in part, reverse in part, and remand.

I.

In May 1987, some 157 investors ("the investors") brought twenty-six lawsuits in federal district court against numerous Quinn-L entities ("Quinn-L") and other parties. The investors, who alleged that they had lost money in various real estate investments offered or managed by Quinn-L, asserted claims under federal securities and anti-racketeering laws as well as Texas law. The cases were assigned to Judge Barefoot Sanders, who consolidated them ("the federal liability suit").

Subsequently, Quinn-L asked Royal Insurance Company of American and Royal Lloyds of Texas (collectively "Royal") to defend it in the federal liability suit pursuant to several insurance policies it had issued to Quinn-L. Royal agreed to do so but reserved its right to contest coverage. On May 10, 1988, Royal filed a declaratory judgment action ("first federal declaratory judgment action"), asking the court to determine whether Royal had a duty to defend or indemnify Quinn-L against the investors' claims brought in the federal liability suit. This declaratory judgment action also was assigned to Judge Sanders.

On June 6, the investors moved to intervene in the federal declaratory judgment action – a motion Royal opposed. The court denied the motion on the ground that the investors had failed to meet the requirements for intervention as of right and that their interest would be protected adequately by Quinn-L.

Royal moved for partial summary judgment on December 12, 1988. While this motion was pending, the

investors entered into a settlement agreement dated April 5, 1989, with Mark Lovell, the sole shareholder of all but one of the Quinn-L entities.[1] Lovell promised to cooperate with the investors in the litigation against Quinn-L and to assign to them any claims he might have against Royal; in return, the investors promised not to pursue any claims against him.[2] The district court found that "settlement negotiations between the Investors' counsel and Lovell started as early as June, 1988 and resulted in a letter agreement by October 11, 1988." *Royal Ins. Co. of Am. v. Quinn-L Capital Corp.*, 759 F. Supp. 1216, 1224 n.10 (N.D. Tex. 1990) ("*Royal*"). It also found that the "sole purpose" of this agreement was to pursue Royal. *Id.* at 1224.

On April 14, 1989, the court granted Royal's partial summary judgment motion, concluding that Royal's policies did not impose any duty to defend or indemnify Quinn-L against the investors' claims in the federal liability suit. The court held that

> the language of the insurance coverage is unambiguous. . . . As a matter of law, the allegations in the pending suits do not state claims within coverage. Although the investors allege loss of their investments, they allege no injury to tangible property which could constitute an "occurrence". Additionally, none of the losses

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[1] The exception is Quinn-L Capital Corporation. Lovell is the sole owner of all of its voting stock and is the beneficial owner of all of its assets.

[2] At this point, Lovell was not a party to the federal liability suit. The investors had, however, objected to the discharge of their claims in Lovell's personal bankruptcy proceedings.

> constitutes "property damage" as required by the policy. [Footnote and citation omitted.]

The court added that "[n]either have Defendants shown that personal injuries (in the form of mental anguish) were caused by an 'occurrence'." The court formally entered partial summary judgment in favor of Royal on April 27.

On May 4, Quinn-L notified the district court regarding the status of the litigation. It stated that in view of the partial summary judgment, no issues remained to be litigated aside from attorneys' fees.

The investors moved to dismiss all their pending actions against Quinn-L on August 3, stating that they and Quinn-L had "reached an agreement in principle for settlement of [their] claims and anticipate reaching an agreement as to the precise terms and conditions of settlement over the next few weeks" and requesting the dismissal in order to "further streamline the litigation pending in this Honorable Court." On August 28, the court dismissed the federal liability suit in its entirety, dismissing the federal claims with prejudice and – declining the exercise pendent jurisdiction – dismissing the state claims without prejudice.

The court entered a final judgment on the federal declaratory action on September 8. At that time, the court again held that Royal had no duty to defend or indemnify Quinn-L for any claims brought in the federal liability suit. This judgment was not appealed.

Approximately five days later, the investors filed suit against Quinn-L in state court in Dallas County, based upon the same events and conduct at issue in the just-

dismissed federal liability suit. In October, Lovell, on behalf of Quinn-L, directed his personal attorney to request that Royal defend Quinn-L in the Dallas County litigation. Royal offered to provide a defense subject to a reservation of rights – the same offer it had made in relation to the federal liability suit.

While awaiting Quinn-L's response, Royal retained an attorney, Coyt Randal Johnston, to represent Quinn-L in the Dallas County case. Because Royal had not received a response from Quinn-L regarding its offer of a qualified defense, Johnston entered a general denial on November 17.

On January 9, 1990, Lovell rejected Royal's offer and demanded an unqualified defense. As the district court later found, "[t]he evidence conclusively establishes that Lovell, on behalf of the Quinn-L Entities, refused Royal's offer of a defense subject to a reservation of rights at the urging of the Investor Plaintiffs." *Royal*, 759 F. Supp. at 1224.[3] Royal declined to acknowledge coverage and instructed Johnston to take no further action in the Dallas County action.

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[3] In a deposition taken on October 18, 1990, Lovell stated:

There was certainly an offer of some type of a defense offered me by Royal or to the companies. I had gone through a similar situation like that with Royal on other situations [i.e., in the federal liability action]. And for two reasons, one, my own and, two for the purposes as part of my settlement agreement with the [investors], I advised to keep them informed.

I refused to accept a settlement or a defense unless there was a full defense. Coverage, I guess, is what it is. I would still maintain that because of those two things that I just mentioned.

Royal repeatedly notified Lovell and his personal attorney that Johnston would no longer take any action in that suit. In a letter dated April 24, Johnston warned them of the "significant risk" of default if they failed to retain new counsel.

On May 16, Johnston filed his motion to withdraw, which was granted on May 30. On May 21, while Johnston's withdrawal motion was pending, the investors served Quinn-L (through Johnston) with numerous requests for admissions. Johnston answered the requests, denying the majority of them. On June 27, the investors moved to strike the responses on the ground that Johnston had prepared them without his client's input. On July 6, a visiting judge granted the investors' unopposed motion to deem the denied requests "admitted."[4]

The Dallas County litigation proceeded to trial the first week of August; Quinn-L did not make an appearance. Based solely upon the deemed admissions obtained by the investors, the court entered a default judgment against Quinn-L in the amount of $741 million, including "actual damages consisting of [lost] investment, . . . damages for bodily injury including mental pain, suffering and anguish which has manifested itself physically," attorneys' fees, and exemplary damages "in an amount equal to treble the actual damages suffered by each Plaintiff."

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[4] In their brief, the appellants note that "[b]y this time, Johnston finally had withdrawn from Quinn-L's defense. Quinn-L, however, was unable financially to hire its own counsel to defend the suit, and, therefore, was unrepresented and did not participate further."

On September 4, Quinn-L (through Lovell) assigned its rights and causes of action against Royal to the investors. In exchange, the investors agreed to pay (1) Quinn-L ten dollars, and (2) Lovell five percent of any further recoveries against Royal in excess of the $741 million default judgment.[5]

On the same day the assignment was executed, the investors filed suit against Royal in state court in Cameron County, bringing claims in two capacities. As assignees of Quinn-L, the investors brought tort, waiver, and estoppel claims based upon Royal's handling of the Dallas County litigation. As judgment creditors, the investors sought recovery of the Dallas County judgment under the applicable insurance policies. On September 17, the investors filed a second action in Cameron County seeking a declaration of coverage for the damages awarded in the Dallas County judgment.

The Cameron County litigation proceeded at an accelerated pace. The day after suit was filed – before Royal had even been served – the court set a trial date of December 10. This was in violation of the court's rules, which provide that a case will be set for trial only after the filing of an answer. *See* Cameron County Civ. Ct. R. 1.5(a). On October 12, the investors filed a motion for summary judgment, which was set for hearing on November 8.

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[5] In the Cameron County action, discussed *infra*, the investors seek to treble the amount of the default judgment. Lovell's share of the potential $2.2 billion judgment would be some $74 million. *See Royal*, 759 F. Supp. at 1226 n.13.

The present action stems from Royal's attempt to enlist the federal district court's aid in enforcing the September 1989 declaratory judgment issued in its favor. On March 9, 1990, while the Dallas County action was pending, Royal filed this suit in federal court (again, before Judge Sanders) seeking a declaratory judgment that would establish that it had no duty to defend or indemnify Quinn-L in the Dallas County litigation.

Quinn-L filed an answer on August 15. It asserted as affirmative defenses, *inter alia*, those claims the investors would bring on September 4 in the Cameron County litigation as Quinn-L's assignees (i.e., the tort, waiver, and estoppel claims). On September 4, Royal moved to add the investors as defendants.

On October 30, Royal asked the federal court to issue a preliminary injunction against further prosecution of the entire Cameron County litigation. After a hearing, the court granted Royal's request. The court found that

> [t]o state the facts bluntly but fairly, the Investor Plaintiffs bought Lovell's cooperation with their April 5, 1989 Agreement and through their collusion with Lovell obtained an enormous default judgment against Lovell's companies.

759 F. Supp. at 1226. The appellants now ask us to reverse the district court's order granting Royal's request for a preliminary injunction.

Prior to oral argument of this case, the appellants filed a petition for writ of prohibition, and in the alternative, a motion for a stay, to prevent the district court from considering any other aspects of this case pending their appeal of the preliminary injunction. We denied their

requests on September 9, 1991. Oral argument was held on October 2.

On October 29, the appellants asked this court to reconsider its earlier denial of the stay. On December 20, while this motion was pending, the district court (1) denied the appellants' motion to dismiss filed pursuant to Fed. R. Civ. P. 12(b)(7); (2) denied their motion for continuance and reopening of discovery; (3) granted Royal's motion for summary judgment on the appellants' affirmative defenses of tort, waiver, and estoppel; and (4) deferred consideration of Royal's application for permanent injunctive relief, pending this appeal. On December 24, the appellants asked us to "vacate all orders entered by the court below during the pendency of the improperly issued preliminary injunction, including the December 20, 1991 summary judgment order." Thus, in addition to the propriety of the district court's preliminary injunction, we consider the appellants' request to vacate the district court's orders of December 20.

II.

First, the appellants challenge the district court's subject matter jurisdiction over the present controversy. They argue that the requirement of complete diversity is absent, *see Carden v. Arkoma Assocs.*, 494 U.S. 185, 187 (1990) (citing *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806)), as Royal Lloyds of Texas, one of the plaintiffs, is a Texas citizen, as are several of the defendants. They also question whether the district court had jurisdiction over the first declaratory judgment action.

A.

Royal Lloyds of Texas is an unincorporated association of insurance underwriters. Citizenship of such an unincorporated association is determined by the citizenship of its "members." *Id.* at 195-96. None of the underwriters is a Texas citizen.[6] Texas law, however, requires that "Lloyd's Plan" insurers such as Royal Lloyds of Texas designate "an attorney in fact or other representative[]" to execute "[p]olicies of insurance." Tex. Ins. Code Ann. art. 18.01-1. The attorney-in-fact must be a citizen of Texas, *see id.* art. 18.02, and Royal Lloyds of Texas's attorney-in-fact is Royal Lloyds, Inc., a Texas corporation.

The appellants argue that as attorney-in-fact, Royal Lloyds, Inc., is a "member" of the unincorporated association of Royal Lloyds of Texas. Royal disagrees, arguing that an attorney-in-fact is a mere agent of the underwriters, not a member. We need not resolve this question, however, for the district court could exercise ancillary jurisdiction over this controversy regardless of the citizenship of the parties.

It is well settled that a federal district court can exercise ancillary jurisdiction over a second action in order "to secure or preserve the fruits and advantages of a judgment or decree rendered" by that court in a prior action. *Southmark Properties v. Charles House Corp.*, 742 F.2d 862, 868 (5th Cir. 1984) (quoting *Local Loan Co. v. Hunt*, 292 U.S. 234, 238 (1934)). Such jurisdiction is appropriate where the effect of an action filed in state court

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[6] According to Royal, the Royal Lloyds of Texas underwriters are citizens of New York and North Carolina.

would "effectively nullif[y]" the judgment of a prior federal action. *Id.* This is true even where the federal district court would not have jurisdiction over the second action if it had been brought as an original suit. *Local Loan Co.*, 292 U.S. at 238; *Southwest Airlines Co. v. Texas Int'l Airlines*, 546 F.2d 84, 89-90 (5th Cir.), *cert. denied*, 434 U.S. 832 (1977).

As discussed more fully *infra*, Royal returned to federal court in order to prevent the appellants from robbing it of the " fruits and advantages" of the federal declaratory judgment rendered in its favor. Because both the Dallas County and Cameron County litigation had the potential of "effectively nullify[ing]" the previous declaratory judgment, we conclude that the district court had ancillary jurisdiction over the present controversy.

B.

The appellants also argue that the district court did not have subject matter jurisdiction over the first declaratory judgment action. From this they conclude that Royal should not be able to bootstrap its way into federal court by filing a second action that depends upon a prior action over which the district court had no jurisdiction.

The appellants, however, cannot launch such a collateral attack on the district court's subject matter jurisdiction. As the Supreme Court has stated,

> A party that has had an opportunity to litigate the question of subject-matter jurisdiction may not . . . reopen that question in a collateral attack upon an adverse judgment. It has long been the rule that principles of res judicata

> apply to jurisdictional determinations – both subject matter and personal.

Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 n.9 (1982) (citations omitted).

The question is not whether the issue of subject matter was actually litigated, but instead whether the parties had the opportunity to raise the question. *Republic Supply Co. v. Shoaf*, 815 F.2d 1046, 1053 (5th Cir. 1987). If the parties against whom judgment was rendered did not appeal, the judgment becomes final and the court's subject matter jurisdiction is insulated from collateral attack. *Id. See also Donovan v. Mazzola*, 761 F.2d 1411, 1416 n.2 (9th Cir. 1985).

The final judgment in the first declaratory action was not appealed. The subject matter jurisdiction of the district court thus is not subject to collateral attack.[7]

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[7] The investors respond that this is not a "collateral attack" because they were not parties to the first declaratory action (their motion to intervene having been denied). Thus, they argue, they had "no opportunity to litigate subject matter jurisdiction." As a preliminary matter, the investors, as assignees of Quinn-L, would stand in no better position than Quinn-L, which is bound by the earlier judgment. In addition, as developed more fully *infra*, the investors are also bound to the first declaratory judgment as judgment creditors, for they were "virtually represented" by Quinn-L during the first declaratory judgment action. *See infra* part III.A.3.

III.

The appellants next contend that the preliminary injunction violates the Anti-Injunction Act, 28 U.S.C. § 2283, which provides,

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

The district court utilized the second and third exceptions to enjoin two different types of claims at issue in the Cameron County litigation.

First, it used the "protect or effectuate" judgments, or "relitigation," exception to enjoin the investors' claims brought as judgment creditors. 759 F.Supp. at 1235. These "direct" claims were brought under the policy to recover damages up to the policy limits. The district court found that it had decided the issue of "coverage" under the language of the applicable Royal policies in the first declaratory judgment action, *id.* at 1234, and that therefore any attempt to relitigate the coverage issue – such as an attempt to recover under the policy language – was barred. *Id.* at 1235.

Second, it enjoined the remaining tort, waiver, and estoppel claims under the "in aid of jurisdiction" exception. These claims, which depend upon conduct and events that occurred after the issuance of the first declaratory judgment, were brought by the investors as assignees of Quinn-L. The district court enjoined the pursuit of these "post-declaratory judgment" claims, which were also before the district court as affirmative defenses

to Royal's second declaratory judgment action, on the ground that "absent the injunctive relief sought by Royal, the [Cameron County court] could irreparably injure the [district court's] ability to decide the present case." *Id.* We will consider the two separate facets of the preliminary injunction in turn.

A.

The relitigation exception was "designed to permit a federal court to prevent state litigation of an issue that previously was presented to and decided by the federal court." *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 147 (1988). The exception is grounded in principles of *res judicata* and collateral estoppel. *Id.* An "essential prerequisite" for application of the relitigation exception "is that the claims or issues which the federal injunction insulates from litigation in state proceedings actually have been decided by the federal court." *Id.* at 148. *See also Texas Employers' Ins. Ass'n v. Jackson*, 862 F.2d 491, 501 (5th Cir. 1988) (en banc), *cert. denied*, 490 U.S. 1035 (1989).

In determining which issues have been "actully decided," the emphasis is on the record and on what the earlier federal court *actually said*, not on the court's *post hoc* judgment as to what the previous judgment was intended to say. *Chick Kam Choo*, 486 U.S. at 148. Any doubt as to whether the order precludes subsequent claims must be resolved in favor of allowing the state court to proceed. *Jackson*, 862 F.2d at 499.

This analysis requires us to compare the issues "actully decided" by the district court in the first federal declaratory judgment action with the issues raised in the

direct contractual obligation claim brought by the investors in Cameron County.

1.

Royal's contractual obligations rest on the policy language[8] in question, which requires it to

> pay on behalf of [Quinn-L] all sums which [it] shall become legally obligated to pay as damages because of
>
> (A) bodily injury or
>
> (B) property damage
>
> to which this insurance applies, caused by an occurrence. . . .

"Occurrence" is defined as

> [a]n accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured.

In its final judgment disposing of the declaratory judgment action dated September 8, 1989, the court stated,

> 1. The allegations in the pending [] suits do not allege an "occurrence," as defined by the policies;

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[8] Although numerous policies were at issue throughout the federal and state litigation, the parties agree that this is the essential policy language.

> 2. The allegations in the pending suits do not allege [] "property damage," or "personal injury" as defined by the policies;
>
> 3. Petitioners, Royal Insurance Company of America and Royal Lloyds of Texas, have no duty to defend the Defendants in the pending suits. . . .

The appellants first argue that the federal declaratory judgment has little or no binding effect because it was a "specific declaration with respect to existing pleadings that were subject to change before, during, or even after trial." The appellants then stress that the final judgment "declares nothing with respect to Royal's obligations should the pleadings be amended, let alone with regard to a different lawsuit not even pending at the time the declaration issued." In other words, the declaratory judgment should be read as applicable only to those pleadings pending before the district court at the time.

Taken to its logical extreme, this argument defeats itself. Under appellants' rule, the losing party could defeat an adverse declaratory judgment by changing one word of its pleadings and filing them in state court. We thus reject the appellants' construction of the declaratory judgment as artificial and unnecessarily formalistic.[9]

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[9] The appellants indeed take their argument to the logical extreme. Focusing upon the district court's use of the "pending suits" language, the appellants contend that the declaratory judgment has no meaning because there were no liability suits pending before the district court at the time (The federal liability suit had been dismissed by the court on August 28; the final declaratory judgment action was issued on September 8.) We again reject appellants' needless formalism.

Instead, we give the district court's decision a more natural reading. Based upon the language of the policy, there must be an occurrence and an injury in order for there to be coverage. In this case, the district court found that the investors' injuries – as alleged in the complaint – were not caused by an occurrence. Without an occurrence, there could be no coverage, and thus there was not duty to defend.[10] In sum, the district court did not simply

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[10] The appellants reject this reading of the policy. They emphasize the policy's definition of "occurrence." They conclude that in order for there to be an occurrence, there must be an accident and injury. From this, they argue that the district court did not necessarily conclude that there was no accident, but rather could have based its "no occurrence" finding on "no injury" – i.e., no mental anguish.

This argument neglects the fact that the district court, in order to find that Royal had no duty to defend the federal liability suit, was obligated to consider the investors' claims of mental anguish. An insurer may be excused from its duty to defend only if "no state of facts could be proved" that would come within the policy coverage. *Green v. Aetna Ins. Co.*, 349 F.2d 919, 926 (5th Cir. 1965). Thus, as Royal argues, "the court could not properly have ignored the Investors' allegations of personal injury – which had long been before it in Quinn-L's counterclaim and summary judgment briefs, in the Investors' proposed amended petitions, and in the Investors' representation that such injuries were 'subsumed in' their previously asserted claims. . . . " The district court could not, as a matter of law, rule that the investors suffered no bodily injury, for that would be a disputed factual issue. The only decision it could make, as a matter of law, would be that whatever the injuries, they were not caused by an occurrence or accident. And this is what the court did indeed conclude in its April 14, 1989, partial summary judgment order when it stated that the "Defendants [failed to show] that personal injuries (in the form of mental anguish) were caused by an 'occurrence'," *see infra* n.11.

decide whether the investors had alleged "injury" caused by an "occurrence," but instead necessarily determined that the investors' allegations did not fit within the coverage of the policy language.[11]

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[11] This conclusion is further supported by the district court's order of April 14, 1989. In its memorandum opinion and order, which awarded partial summary judgment in Royal's favor, the district court stated,

> The Court finds that the language of the insurance coverage is unambiguous. . . . As a matter of law, the allegations contained in the pending suits do not state claims within coverage. Although the investors allege loss of their investments, they allege no injury to tangible property which could constitute an "occurrance".[3] Additionally, none of the losses constitutes "property damage" as required by the policy.
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>
> [3]Neither have Defendants shown that personal injuries (in the form of mental anguish) were caused by an "occurrence".

[Citation and footnote omitted.] In other words, the investors suffered "no injury" – either to property or in the form of mental anguish – that "could constitute an 'occurrence' " within the terms of the policy.

We recognize that orders of partial summary judgment, standing by themselves, have no preclusive effect, as they are interlocutory. *Avondale Shipyards, Inc. v. Insured Lloyd's*, 786 F.2d 1265, 1269-72 (5th Cir. 1986). *Avondale*, however, does not prevent us from considering the preclusive effect of the summary judgment order in this case.

As we noted in *Avondale*, the partial summary judgment order in that case had no preclusive effect because the final judgment "made no direct or indirect reference whatever to [prior] partial summary judgment or to prior orders in general. . . . " *Id.* at 1272. By contrast, the September 8 final judgment against [Quinn-L] in light of the Court's ruling on [Royal's] Motion for Partial Summary Judgment." The "partial" summary judgment was "partial" in name only. It decided the

The case cited by the appellants discussing the complaint-allegation rule are not to the contrary. It is true that "[u]nder Texas law, the insurer's duty to defend is determined solely from the face of the pleadings and without reference to facts outside of the pleadings." *Rhodes v. Chicago Ins. Co.*, 719 F.2d 116, 119 (5th Cir. 1983). Application of this "complaint-allegation" rule "gives rise to a duty to defend if one or more of the plaintiff's claims, 'if taken as true, [are] sufficient to state a cause of action . . . coming within the terms of the policy.' " *Id.* (citation omitted).

But simply because the duty to defend is determined on the face of the complaint, and not with reference to the truth or falsity of the allegations contained therein, does not mean that the preclusive effect of a declaration of no duty to defend must be limited to the precise allegations contained in the pleadings. In this case, the district court determined the issue of coverage – that no "occurrence" had befallen the investors within the terms of the policy – and this determination can be applied to allegations in subsequent complaints.[12]

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major issues in the case and entry of the final judgment was a mere formality.

[12] The appellants argue that the district court erroneously applied principles of claim preclusion, as opposed to issue preclusion, in coming to this conclusion. Although the court did mention claim preclusion in its opinion, its analysis of the first declaratory judgment plainly states that "the Court finally interpreted the language in certain policy clauses, and the *issue* of the meaning of those clauses was *necessary and essential* to the Court's Judgment," 759 F. Supp. at 1234 (emphasis added) – language of issue preclusion. We therefore disagree with the appellants that the district court ran afoul of *Jackson*. *See Jackson*,

2.

We now must compare the foregoing interpretation of the district court's final judgment with the investors' claims in the Cameron County litigation. In their original petition, the investors allege the following:

> 29. The injuries suffered by Plaintiffs as a result of Quinn-L Entities['] conduct, for which damages have been awarded by [the Dallas County] Judgment *are injuries which are covered* by the relevant insurance policies issued by Defendants The Royal Insurance Group. . . .
>
> 30. The allegations of Plaintiffs' complaint in [the Dallas County petition] *stated an "occurrence" which had resulted in "property damage" or "bodily injury,"* as defined by the insurance policies. . . . The Quinn-L E[n]tities' conduct . . . has caused the Plaintiffs property damage and bodily injury and, therefore, the Defendants are responsible for the payment of the Judgment entered therein.
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> . . .
>
> 32. [Royal is] liable directly to Plaintiffs, as judgment creditors under the [Dallas County judgment]. The Plaintiffs, judgment creditors, would further allege that [Royal is liable] to them for the entirety of the judgment rendered

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862 F.2d at 501 (noting that "true" res judicata, or claim preclusion, "appears to be inconsistent with *Chick Kam Choo's* admonishment that the relitigation exception 'is strict and narrow' so that only 'claims or issues which . . . actually have been decided' in the prior proceeding as reflected by what the prior 'order *actually* said' are protectable thereunder" (citation omitted)).

> - [in the Dallas County judgment] against the Quinn-L Entities . . . *for the reason that the policies of insurance purchased by Quinn-L Entities provide coverage for the injuries caused to Plaintiffs by the Quinn-L entities and upon which judgment was granted by the [Dallas County court].* [Emphasis added.]

Given that the investors allege that the Dallas County judgment would be covered by the policy language, the question is whether the investors, after the issuance of the first federal declaratory judgment, amended their pleadings in such a way as to bring their claims within policy coverage. Indeed, the investors argue that they substantially altered their claims between September 8 (the date the district court entered its final declaratory judgment) and September 14 (the date the investors refiled their state claims in Dallas County state court).

The crucial difference, they argue, is that the Dallas County action they "alleged mental anguish caused by Quinn-L's negligence and gross negligence" in making a number of improper management decisions.[13] They argue that in the first declaratory judgment action, the sole

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[13] In the Dallas County petition, the investors alleged that "Plaintiffs' . . . injuries and damages were proximately caused by the negligent conduct of Defendant in," among other things, "improperly treating all partnerships and companies as one entity for financial purposes," "syndicating partnerships while having lack of the financial wherewithal to fund the cash needs of the partnerships," and "improperly managing and structuring the companies and partnerships and thereby creating tax problems with the IRS concerning various entities." These improper acts caused the investors to "suffer[] bodily injury, including mental pain, suffering and anguish."

dispute was over whether the investors alleged mental anguish. In the words of the appellants, "the declaratory judgment only decided that the then pending action did not allege mental anguish."

As noted above, however, the declaratory judgment did more than that. The appellants' reading of the judgment simply ignores the fact that the court held that "allegations in the pending[] suits do not allege an 'occurrence,' as defined by the policies." Thus, the only way that the appellants could overcome the declaratory judgment hurdle was to allege, in the Dallas County petition, a basis for finding an occurrence.

The allegedly improper acts on Quinn-L's part, however, remained constant from the federal liability suit to the Dallas County suit. Thus, the district court's determination of the coverage issue would dispose of the appellants' claims to recover under the policy language. We therefore affirm the district court's injunction of the appellants' direct contractual claims under the relitigation exception.

3.

The investors respond that they cannot be bound by the first declaratory judgment because they were not parties to the action (their motion to intervene having been denied). We have recognized, however, that "it is within the discretion of a district court to expand the scope of an otherwise valid injunction issued pursuant to the relitigation exception of the Anti-Injunction Act to include those in privity with parties to the federal court

action." *Quintero v. Klaveness Ship Lines*, 914 F.2d 717, 721 (5th Cir. 1990), *cert. denied*, 111 S. Ct. 1322 (1991).

Indeed, a non-party will be considered "in privity, or sufficiently close to a party in the prior suit so as to justify preclusion," where the party to the first suit is so closely aligned with the nonparty's interests as to be his "virtual representative." *Benson & Ford, Inc. v. Wanda Petroleum Co.*, 833 F.2d 1172, 1174-75 (5th Cir. 1987). *See also Aerojet-Gen. Corp. v. Askew*, 511 F.2d 710, 719 (5th Cir.), *cert. denied*, 423 U.S. 908 (1975). In order for virtual representation to arise, however, there must be "an express or implied legal relationship" between the party and the nonparty "in which [the] part[y] to the first suit [is] accountable to [the] non-part[y] who file[s] a subsequent suit raising identical issues." *Benson & Ford*, 833 F.2d at 1175 (citation omitted).

The question of "whether a party's interests in a case are virtually representative of the interests of a nonparty is one of fact for the trial court." *Aerojet-Gen.*, 511 F.2d at 719. In the preliminary injunction context, we review findings of fact for clear error. *Apple Barrel Prods. v. Beard*, 730 F.2d 384, 386 (5th Cir. 1984).

In this case, the district court found that the investors were in privity with Quinn-L. 759 F. Supp. at 1232. The court concluded that the "Investor Plaintiffs bought Lovell's cooperation with their April 5, 1989 Agreement and through their collusion with Lovell obtained an enormous default judgment against Lovell's companies." *Id.* at 1226. The court further found that "settlement negotiations between the investors' counsel and Lovell started as early as June, 1988 and result in a letter agreement by

October 11, 1988." *Id.* at 1224 n.10. Thus, Lovell and the investors came to a cooperation agreement long before anything of substance was adjudicated in the first declaratory judgment action.

The appellants stress that in the October 1988-April 1989 assignment, Lovell gave the investors only the right to sue in Lovell's name for the damages Royal had caused him personally and that only later (September 4, 1990) did Quinn-L assign its rights to the investors to pursue Royal. But simply because the formal legal relationship between Quinn-L and the investors did not arise until September 4, 1990, does not mean that there was no privity between them before that time.

The district court found that Lovell had sole authority to act for Quinn-L, 759 F. Supp. at 1219 n.1,[14] that Lovell was "bought off" by the settlement agreement, *id.* at 1226, that the "sole purpose" of that agreement was to pursue Royal,[15] *Id.* at 1224, and that from that point on the investors and Quinn-L (through Lovell) pursued a course of conduct to obtain a hefty payment from Royal in which they would all share, *id.* at 1226 & n.13. The district court did not clearly err in concluding that the investors were virtually represented by Quinn-L in the

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[14] In January 1989, the bankruptcy court returned Quinn-L's valueless stock to Lovell. Since Lovell filed for personal bankruptcy in 1987, Quinn-L has had no officers, directors, or significant assets. Thus, since January 1989 Lovell has had sole authority to act for Quinn-L. *See Royal*, 759 F. Supp. at 1219 n.1.

[15] In a letter written to Lovell's counsel, the investors' attorney noted that "the whole point of the [April 5] Compromise and Settlement Agreement was for Plaintiffs to be able to pursue Royal Insurance Company."

first declaratory judgment action. We therefore determine that the investors can be bound by the first declaratory judgment action.

B.

In their Cameron County suit, the investors also seek to recover damages from Royal based upon Royal's post-declaratory judgment conduct. As Quinn-L's assignees, the investors allege, *inter alia*, that Royal (1) "wrongfully refused" an unqualified defense of the Dallas County litigation; (2) "negligently failed" to settle the Dallas County litigation; (3) waived its right to challenge coverage and is estopped from denying coverage because of its representations to Quinn-L; (4) was negligent in its handling of the Dallas County litigation; and (5) breached its "duty of good faith and fair dealing."

These claims were brought before the federal district court on August 15, 1990, when Quinn-L answered Royal's declaratory judgment petition of March 9, 1990. They were presented to the Cameron County court on September 4, 1990, when the investors filed suit therein. The district court enjoined these post-declaratory judgment claims under the "in aid of jurisdiction" exception to the Anti-Injunction Act."[16]

1.

The "in aid of jurisdiction" exception is designed to "prevent a state court from so interfering with a federal

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[16] Royal has conceded that the injunction of these claims cannot be justified under the relitigation exception.

court's consideration or disposition of a case as to seriously impair the federal court's flexibility and authority to decide that case." *Atlantic Coast Line R.R. v. Brotherhood of Locomotive Eng'rs*, 398 U.S. 281, 295 (1970). The district court noted that "[t]his is precisely such a case; absent injunctive relief the Court will likely lose the ability to decide this case (filed well before either [Cameron County] Action) and may well have its prior Judgments (which are inextricably intertwined with the present action) nullified by contrary state court decrees." 759 F. Supp. at 1235.

The "in aid of jurisdiction" exception, however, does not reach this far. In *Texas v. United States*, 837 F.2d 184, 186 n.4 (5th Cir.), *cert. denied*, 488 U.S. 821 (1988), we noted the following:

> In cases decided under [the "in aid of jurisdiction"] exception, courts have interpreted the language narrowly, finding a threat to the court's jurisdiction *only where a state proceeding threatens to dispose of property that forms the basis for federal in rem jurisdiction, or where the state proceeding threatens the continuing superintendence by a federal court*, such as in a school desegregation case. In no event may the "aid of jurisdiction" exception be invoked merely because of the prospect that a concurrent state proceeding might result in a judgment inconsistent with the federal court's decision. [Emphasis added.] [Citations omitted.]

See also Phillips v. Chas. Schreiner Bank, 894 F.2d 127, 132 (5th Cir. 1990) (exception only applies to *in rem* actions, citing *Texas v. United States*). The post-declaratory judgment claims at issue in this case do not fit in either

category described in *Texas v. United States*. They obviously do not involve the district court's *in rem* jurisdiction, nor do they implicate any "superintendence" jurisdiction on the district court's part.

Royal correctly points out that the contours of the categories described in *Texas v. United States* are not well-defined. The district court relied upon an Eleventh Circuit holding that "lengthy, complicated litigation is the 'virtual equivalent of a res,' " *Battle v. Liberty Nat'l Life Ins. Co.*, 877 F.2d 877, 882 (11th Cir. 1989) (citation omitted), and indeed our opinion in *Texas v. United States* does not specifically preclude such interpretation.[17] But even if

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[17] The district court also relied heavily upon our decision in *In re Corrugated Container Antitrust Litig.*, 659 F.2d 1332 (5th Cir. Unit A Oct. 1981), *cert. denied*, 456 U.S. 936 (1982), which involved a massive antitrust class action against manufacturers of corrugated containers that was consolidated by the Judicial Panel on Multidistrict Litigation and transferred to the Southern District of Texas. The multidistrict court approved of "settlements executed between the class plaintiffs and most of the defendants." *Id.* at 1335.

Some of the class plaintiffs, apparently unhappy with the settlements, went to state court with their claims. A panel of this court held that the injunction of the state action was proper because the multidistrict court's approval of the settlements would "bar the South Carolina litigation" on principles of *res judicata*. *Id.* Thus, the panel based its decision upon the *relitigation* exception, and to that extent the case does not support the district court's injunction of the tort, waiver, and estoppel claims.

The *Corrugated Container* case does contain some jurisdictional language, but it must be construed in light of the factual circumstances, of the case. When the plaintiffs filed in state court, they asked for and immediately obtained an injunction prohibiting the defendants (many of whom were defendants in

we were to broaden the "in aid of jurisdiction" exception to include "lengthy, complicated litigation" that is the "equivalent of a res," we would not put the present action in that category.

The Cameron County court posed no threat to the district court's continuing jurisdiction to decide the post-declaratory judgment claims, other than the fact that there was a possibility that it could reach judgment first. This is not sufficient to invoke the "in aid of jurisdiction" exception. *Texas v. United States*, 837 F.2d at 186 n.4 (citing *Atlantic Coast Line*).[18] It is true that, as Royal argues, the

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the multidistrict litigation) from "preparing, disseminating or utilizing any settlement document . . . wherein such settlement document contains any release of any antitrust claims" under state law. *Id.* at 1335. The panel noted that this limitation "would clearly interfere with the multidistrict court's ability to dispose of the broader action pending before it." *Id.* The court also noted that the multidistrict court's injunction of the state suit would not flout "the policies of federalism" because the plaintiffs' attorneys "ha[d] taken, and manifested an intention to continue to take, actions threatening this court's exercise of its proper jurisdiction and the effectuation of its judgments, by filing and threatening to file duplicative and harassing litigation in the courts of various states and by seeking therein orders disrupting the proceedings" in the multidistrict litigation. *Id.* (quoting the multidistrict court).

This interference, however, was based upon the attorneys' (and, presumably, the state court's) apparent disregard of the prior federal settlement judgment – again, a consideration more appropriate for the *relitigation* exception. Thus, we disagree with the district court when it states that "[t]he same considerations [as those posed in *Corrugated Container*] apply to the present action. . . . " 759 F. Supp. at 1236.

[18] The nature of the "threat" is shown most vividly by the fact that the district court entered an order disposing of these

district court invested a great deal of time in resolving the first declaratory judgment action and in enforcing the first declaratory judgment in the second declaratory judgment action. But the investment is adequately protected by the relitigation exception, which avoids "costly and judicially wasteful" duplicative proceedings. *Quintero*, 914 F.2d at 721.

The district court's investment of time and energy in resolving the coverage issue would be protected by an injunction barring relitigation of that issue – not by barring *any claim* dependent upon that issue. We therefore conclude that the district court should have limited the scope of its injunction to enjoining relitigation of the coverage issue and that its injunction of the post-declaratory judgment claims was improper.

2.

Royal offers a slightly different justification for enjoining the post-declaratory judgment claims. It contends that the district court "was entitled to conclude that the [Cameron County] litigation should be temporarily enjoined until the district court had an opportunity to sort through the complex web of claims raised against enforcement of its prior judgment." In essence, Royal argues that, given that this is a preliminary injunction, the district court should be given greater leeway with regard to the injunction's scope, especially considering

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claims on December 20, 1991. The district court's resolution of these claims is discussed *infra* part IV.

that the district court found to be collusive behavior on the appellants' part.

Although we are sympathetic, we cannot allow the exceptions to be stretched beyond their justifications. As the Court noted in *Chick Kam Choo*, "the exceptions are narrow and are 'not [to] be enlarged by loose statutory construction.' " 486 U.S. at 146 (citation omitted). Moreover, the district court plainly recognized that there were two types of claims at issue – those wholly dependent upon the prior declaratory judgment (the direct claims as judgment creditors) and those "inextricably intertwined" with the issues settled by the declaratory judgment (the post-declaratory judgment claims).

The district court therefore did not enjoin the post-declaratory judgment claims in order to "sort things out"; rather, it did what it said it was doing – enjoining the Cameron County action because the state court "could irreparably injure the Court's ability to decide the present case." *Royal*, 759 F. Supp. at 1235. As noted above, however, the only irreparable injury that the state court posed was deciding the claims. This sort of "interference" is not sufficient to overcome the obstacle of the Anti-Injunction Act.

IV.

Finally, we consider the various motions, pending in this court, to prevent the district court from considering aspects of the case not directly at issue in this appeal. Prior to oral argument, the appellants asked us to stay the district court proceedings pending appeal. Essentially,

this would have prevented the district court from considering the merits of the appellants' tort, waiver, and estoppel claims brought as affirmative defenses to Royal's request for declaratory judgment. We denied the motion without opinion on September 6, 1991.

After oral argument, on October 29, the appellants submitted a motion to reconsider the motion for stay of the district court proceedings. On December 20, while the motion for reconsideration was pending, the district court disposed of, *inter alia*, the post-declaratory judgment claims adversely to the appellants. By a December 24 letter, the appellants asked us to "vacate all orders entered by the court below during the pending of the improperly issued preliminary injunction, including the December 20, 1991 summary judgment order" covering the post-declaratory judgment claims. Thus, the motion for reconsideration is partially mooted[19] by the orders of the district court, and we now consider the appellants' request to vacate the orders entered while this appeal was pending.

We decline to vacate these orders. As noted above, the appellants' tort, waiver, and estoppel claims were before both the federal district court and the Cameron County court. There was always the possibility that the federal court would win the race to judgment; in fact, the odds were heavily in the federal court's favor. It had dealt with the litigation among these parties for over three years by the time the tort, waiver, and estoppel

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[19] The district court did not rule on Royal's request for a permanent injunction, deferring that issue pending the outcome of this appeal.

claims were placed before it on August 15, 1990; therefore, it was familiar with the facts and legal disputes. By contrast, the Cameron County court's first exposure to the case was September 4, 1990, when the appellants filed their suit.

At most, what the district did by enjoining these claims was to ensure it would win the race. We are well aware of the general rule that parallel state and federal actions should be allowed to proceed without interference from either court. *Atlantic Coast Line*, 398 U.S. at 295-96. Vacating the orders of the district court, however, would do nothing to put the state and federal courts back on an even footing. Indeed, the district court would be free to re-enter its orders the moment after they were vacated. Thus, even if vacating orders would be appropriate in some cases, it would merely be an academic exercise in this case.

Finally, we note that the equities do not weigh in the appellants' favor. They created this tangled web of litigation by seeking to evade the effect of the first declaratory judgment action: Having encountered a roadblock in federal court, they brought their claims to state court, collusively obtained an inflated default judgment there, and sought to collect that judgment (and more) in another state court. That their "victory" on the "in aid of jurisdiction" question is a somewhat hollow one does not persuade us to vacate the district court's orders. The appellants presumably may appeal the district court's disposition of their tort, waiver, and estoppel claims.

V.

In conclusion, we find that the district court had ancillary jurisdiction over this matter. In addition, we find that the portion of the injunction based upon the relitigation exception – the injunction of the appellants' direct claims as judgment creditors under the insurance contract – was proper. We further find that the portion of the injunction based upon the "in aid of jurisdiction" exception – the injunction of the appellants' tort, waiver, and estoppel claims brought as assignees – was improper. We therefore AFFIRM in part, REVERSE in part, and REMAND. Finally, we DENY the appellants' request to vacate the district court's orders entered during the pendency of this appeal.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-1808

ROYAL INSURANCE COMPANY OF AMERICA and
ROYAL LLOYDS OF TEXAS,

Plaintiffs-Appellees,

versus

QUINN-L CAPITAL CORPORATION, ET AL.,

Defendants-Appellants.

Appeal from the United States District Court for the
Northern District of Texas

ON SUGGESTION FOR REHEARING EN BANC

(Opinion 09/27/93, 5 Cir., ___, ___ F.2d ___)

(November 5, 1993)

Before WISDOM, DAVIS, and SMITH, Circuit Judges.

PER CURIAM:

(✔) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

( ) Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ J. Smith
United States Circuit Judge

CLERK'S NOTE:
SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

Judge Higginbotham did not participate in the consideration of the suggestion of rehearing en banc.

PETITIONERS FOR WRIT OF CERTIORARI

Arthur R. Miller is Counsel for the following Petitioners: QUINN-L CAPITAL CORPORATION, QUINN-L FINANCIAL CORPORATION, QUINN-L EQUITIES, INC., QUINN-L MANAGEMENT CORP., QUINN-L MORTGAGE CORP. (collectively, "Quinn-L").

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Supreme Court, U.S.
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No. 93-___

In The

Supreme Court of the United States

October Term, 1993

QUINN-L CAPITAL CORPORATION, et al.,

Petitioners,

v.

ROYAL INSURANCE COMPANY OF AMERICA, and ROYAL LLOYDS OF TEXAS,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ROYAL INSURANCE COMPANY OF AMERICA and ROYAL LLOYDS OF TEXAS	*	Civil Action No. 3-90-0550-H
Plaintiffs	*	
v.	*	
QUINN-L CAPITAL CORPORATION, *et al.*	*	
Defendants	*	

MEMORANDUM OPINION AND ORDER[1]

(Filed Dec. 20, 1991)

Before the Court are

1. Defendants' William O. Akin, William Bradley, Michael Cummins, Jorge Y. Herszage, Bonner H. Jackson and James L. Tucker Motion to Dismiss Pursuant to Rule 12(b)(7) and Brief in Support Thereof, filed August 29, 1991; and Plaintiffs' Opposition to Defendants' Motion to Dismiss, filed September 12, 1991.

2. Supplement to Defendants' Rule 56(f) Motion for Continuance and for Reopening of Discovery Due to Plaintiffs' Continued Failure to Produce Over One Thousand Documents,

[1] For the purposes of this Order, the Plaintiffs in this action will be referred to as "Royal," and the multiple Defendants as "Quinn-L."

filed September 30, 1991; and Plaintiffs' Opposition to Defendants' Motion, filed October 17, 1991.

3. Plaintiffs' Motion for Summary Judgment and supporting documents ("Royal's Memorandum"), filed July 30, 1991; Defendants' Opposition to Plaintiffs' Motion and supporting documents ("Quinn-L's Opposition Brief"), filed October 1, 1991; and Plaintiffs' Reply Memorandum in Support of Motion for Summary Judgment, filed October 22, 1991.

4. Plaintiffs' Motion to Strike All or Parts of Affidavits Offered by Defendants in Opposition to Plaintiffs' Motion for Summary Judgment and supporting documents, filed October 16, 1991; and Defendants' Opposition to Plaintiffs' Motion and supporting documents, filed November 5, 1991.

5. Plaintiffs' Application for Declaratory and Permanent Injunctive Relief, filed July 30, 1991; and Defendants' Opposition to Plaintiffs' Application and supporting Brief, filed September 30, 1991.

The Court considers the motions in the order presented above.

I. Factual Summary[2]

This case finds its inception in May of 1987 when twenty-six lawsuits were brought in the U.S. District Court for the Northern District of Texas by some 157 investors (the "Investors") who allegedly lost money they had invested in various syndicated real estate investments offered or managed by one or more of the Defendant Quinn-L entities. The suits were filed against the numerous Quinn-L entities ("Quinn-L") and Mark Lovell[3]. The Investors asserted claims under the federal

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[2] This factual summary is largely drawn from this Court's previous findings of fact in its grant of preliminary injunction in *Royal Ins. Co. v. Quinn-L Capital Corp.*, 759 F. Supp. 1216, 1218-27 (N.D. Tex. 1990) ("*Royal*" or "Preliminary Injunction Order").

Findings of fact and conclusions of law made in connection with a preliminary injunction are not binding. The Court may come to different conclusions at the trial on the merits. *See University of Texas v. Camenisch*, 451 U.S. 390 (1981); *Mylett v. Jeane*, 910 F.2d 296, 299 (5th Cir. 1990). However, reliance on such findings of fact in considering a motion for summary judgment is appropriate as long as the party opposing the motion does not present specific facts that dispute a material finding. *See generally* discussion of standard for granting summary judgment, *infra* pages 14-15. In the absence of any material issue of fact, other courts have similarly adopted findings of fact from the preliminary injunction stage in granting a motion for summary judgment. *See Communications Maintenance, Inc. v. Motorola, Inc.*, 761 F.2d 1202, 1205-06 (7th Cir. 1985); *Massachusetts Law Reform Institute, Inc. v. Legal Services Corp.*, 601 F. Supp. 415, 417 (D.C. 1984).

[3] Lovell is the sole shareholder of all of the Quinn-L entities, except for Quinn-L Capital Corporation. Lovell is the sole owner of all of the voting stock of Quinn-L Capital Corporation and is the beneficial owner of all of its assets. Since January of 1989, Quinn-L Capital Corporation has had officers, directors,

securities and anti-racketeering laws, as well as under Texas law. The twenty six lawsuits brought by the Investors against Quinn-L and Lovell were consolidated by the Court into one case (the "Federal Liability Suits").

Subsequently, Quinn-L, through the Dunn-Odom Insurance Agency Inc., requested that Royal defend them in the Federal Liability Suits, which Royal agreed to do subject to a reservation of rights. Quinn-L accepted this qualified defense by Royal. On May 10, 1988 Royal filed a separate declaratory judgment action in this Court (the "First Federal Declaratory Judgment Action"), seeking a declaration that it owed no duty to defend, and no duty to indemnify Quinn-L for any claims brought in the Federal Liability Suits. *See Royal Insurance Company of America v. O-L Investments, Inc.*, No. CA3-88-1069-H.

On June 6, 1988 the Investors moved to intervene in the First Federal Declaratory Judgment Action, alleging that they needed to protect their bona fide interests. The Court denied the Investors' Motion to Intervene.

On April 14, 1989 the Court granted Royal's Motion for Partial Summary Judgment in the First Federal Declaratory Judgment Action, concluding that Royal's policies did not impose any duty to defend or indemnify Quinn-L against the Investors' claims in the Federal Liability Suits. The Court found that none of the Investors' allegations constituted an "occurrence" or "property

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or significant assets, and Lovell has had sole authority to act for the Quinn-L Capital Corporation. As a result, for the purpose of brevity, the Court's reference to Quinn-L will also include Lovell.

damage" as required by the policy. The Court further held that the Investors had not shown that personal injuries in the form of mental anguish were caused by an occurrence. The Court formally entered partial summary judgment against Quinn-L on April 27, 1989, enumerating therein the cause numbers of the suits then pending as the consolidated Federal Liability Suits ("Partial Summary Judgment").

In a report filed May 4, 1989 Quinn-L notified the Court that in view of the Partial Summary Judgment, aside from the issue of attorneys' fees, no issues remained to be litigated in the case. On July 28, 1989 Royal and Quinn-L submitted a stipulation of facts to the Court acknowledging that many policies not specifically enumerated in the Court's Partial Summary Judgment nevertheless fell within the scope of the Court's ruling. On September 8, 1989 the Court entered a Final Judgment in the First Federal Declaratory Judgment Action that consolidated the terms of the April 27, 1989 Partial Summary Judgment, the May 4, 1989 Quinn-L Report, and the July 28, 1989 Stipulation entered into between Quinn-L and Royal ("Final Judgment"). This Final Judgment was not appealed.

Just prior to the entry of the Final Judgment, on August 28, 1989 in response to the Investors' Motion to Dismiss the Federal Liability Suits, the Court dismissed the Plaintiffs' federal claims with prejudice, and dismissed Plaintiffs' remaining state law claims without prejudice, pursuant to the rules established by *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966). The Investors' Motion to Dismiss represented that "Plaintiffs and these

Quinn-L Defendants have reached an agreement in principle for settlement of plaintiffs' claims" and requested the dismissal in order to "further streamline the litigation pending in this Honorable Court." *Royal*, 759 F. Supp. at 1216, 1222 n.7 (N.D. Tex. 1990).

Approximately two weeks after the dismissal, on September 14, 1989 the Investors filed a lawsuit against Quinn-L in the 298th Judicial District Court of Dallas County, Texas, styled *Adkisson v. Quinn-L Capital Corporation*, Cause No. 89-11030-M ("*Adkisson*"). *Adkisson* was based on the same transactions and alleged claims identical to the state-law claims originally brought in the earlier Federal Liability Suits.

In October of 1989, Lovell, on behalf of Quinn-L, directed his personal attorney to request a defense of *Adkisson* from Royal. Royal offered a defense subject to a reservation of rights, and retained an attorney, Coyt Randall Johnston, to represent the Quinn-L Defendants pending a response to its offer of qualified defense. At the time an answer was due in *Adkisson*, Quinn-L had made no effort to obtain independent counsel to enter an appearance, and Johnston filed a general denial to Plaintiffs' petition in *Adkisson* on November 17, 1989.

On January 9, 1990 Lovell rejected Royal's offer, and demanded an unqualified defense. Royal refused to provide Quinn-L an unqualified defense, and instructed Johnston to take no further action in *Adkisson*.

The evidence conclusively establishes that Lovell, on behalf of Quinn-L, refused Royal's offer of a defense subject to a reservation of rights at the urging of the Investors, and because of a Compromise and Settlement

Agreement entered into by the Investors, on the one hand, and Lovell, his wife, and Ogden Sutro (all of whom were individual Defendants in the Federal Liability Suits), on the other ("Settlement Agreement"). The Settlement Agreement had been signed on April 5, 1989, while the Federal Liability Suits and the First Federal Declaratory Judgment Action were pending. The sole purpose of the Settlement Agreement was to pursue Royal. *See Royal* 759 F. Supp. at 1224.

Adkisson was called for trial in state court on August 7, 1990. No appearance was made on behalf of the Quinn-L Defendants. Based on the evidence presented by the Investors, the Dallas state district court entered a default judgment against Quinn-L for more than $740 million. As outlined in detail in *Royal*, the lack of representation of Quinn-L and the resulting default judgment were caused directly by the Investors' Settlement Agreement and collusion with Lovell. *See id.* at 1224-26.

On September 4, 1990 Quinn-L, through Lovell, executed an Assignment of its rights and causes of action, if any, against Royal and its agents to the Investors (the "Assignment"). By the terms of the Assignment, the Investors agreed to pay Quinn-L ten dollars ($10) and Lovell personally five percent (5%) of any future recoveries against Royal in excess of the $740 million *Adkisson* default judgment.

On the same day the Assignment was executed, September 4, 1990 the Investors filed suit in the District Court for the 107th Judicial District, Cameron County, Texas, in Cause No. 90-09-4464-A (the "Brownsville Liability Action"). In that action, the Investors sought, as

judgment creditors and assignees of Quinn-L, to hold Royal responsible for the payment of the Default Judgment entered in *Adkisson* in Dallas. The Investors filed a second action in the Brownsville court on September 17, 1990, seeking a declaratory judgment that Royal and/or the Dunn-Odom Insurance Agency, Inc. are liable for the *Adkisson* default judgment (the "Brownsville Declaratory Judgment Action"). As discussed in detail in *Royal*, all of the policies addressed by the Brownsville Liability and Declaratory Judgment Actions had been fully litigated and determined by this Court. *See Royal*, 759 F. Supp. at 1227.

On March 9, 1990 Royal filed this case for declaratory judgment. In this action, Royal seeks to establish that Quinn-L is barred from asserting any claim that Royal had a duty to defend or indemnify against the claims asserted in *Adkisson*.

Quinn-L filed an answer in this case on August 15, 1990, asserting as affirmative defenses that enforcement of the prior declaratory judgment (i.e. the September 8, 1989 Final Judgment) is barred by "estoppel," "waiver" and Royal's "contributory negligence." Quinn-L August 15, 1990 Answer at ¶¶ 28-30, Plaintiffs' Exhibit ("PX") C-2.

On November 30, 1990, after a hearing, pursuant to its authority under the relitigation and in aid of jurisdiction exceptions to the Anti-Injunction Act, this Court granted Royal's application for a preliminary injunction against further prosecution of the Brownsville actions. *See Royal Ins. Co. v. Quinn-L Capital Corp.*, 759 F. Supp. 1216

(N.D. Tex. 1990). The Investors have appealed the Court's November Order to the Fifth Circuit.

II. Motion to Dismiss

Quinn-L moves to dismiss this case[4] brought by Royal pursuant to Federal Rule of Civil Procedure 12(b)(7)[5]

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[4] Quinn-L first moved for dismissal on September 27, 1990 for lack of jurisdiction. Since then, Quinn-L has moved for dismissal at least nine additional times. From November 22, 1990 onward, all Quinn-L's motions for dismissal have been premised on Rule 12(b)(7). Each subsequent motion under the Rule, while submitted on behalf of different defendants, is substantially the same as the preceding motion. For this reason, disposition of the pending motion effectively disposes of all preceding motions for dismissal.

[5] Federal Rule of Civil Procedure 12(b)(7) allows a defense for failure to join a party under Rule 19 to be made by motion. Rule 19(b), upon which Quinn-L relies, governs the court's determination where joinder of persons will deprive the court of subject matter jurisdiction, and provides in relevant part,

> If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder

("F.R.C.P."). Quinn-L argues that the Professional Investors Partnership II ("Professional Investors") is an indispensable and non-diverse party, in whose absence, the present action must be dismissed.

Professional Investors is *one* of the 157 investors who initiated the Federal Liability Suits in 1987, and *Adkisson* in 1989. On September 26, 1990 the Court granted Royal's motion to amend its pleadings in this case, and to join all 157 investors as parties to be joined if feasible pursuant to F.R.C.P. 19(a). Subsequent to the joinder, Quinn-L moved to dismiss this case on the grounds that three of the fifteen partners in Professional Investors were non-diverse with Royal. On September 28, 1990, before Professional Investors answered the lawsuit, the Court entered Royal's Notice of Dismissal under F.R.C.P. 41(a)(1)(i) as to Professional Investors, alone.

Quinn-L's motion is without merit. Whether a lawsuit should proceed in a party's absence under Rule 19(b) is a discretionary matter for the court to determine based on pragmatic, practical, case by case considerations. *See Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 118 (1968); *Kelly v. Commercial Union Ins. Co.*, 709 F.2d 973, 978 (5th Cir. 1983).

First, joinder of the Professional Investors would not deprive this Court of its subject matter jurisdiction, and for this reason, Quinn-L's reliance on Rule 19 subsection (b) is misguided. This Court possesses ancillary federal jurisdiction, irrespective of diversity considerations, to enforce its previous Final Judgment. *See Southmark Properties v. Charles House Corp.*, 742 F.2d 862, 868 (5th Cir. 1984) ("It is well settled, . . . , that a district court possesses

ancillary jurisdiction 'to secure or preserve the fruits and advantages of a judgment or decree rendered' by that court"). *See also Samuel C. Ennis & Co. v. Woodmar Realty Co.*, 542 F.2d 45, 48 (7th Cir. 1976) (holding that federal court has jurisdiction over nondiverse parties in action to enjoin state court proceedings where state court action could nullify prior federal judgment), *cert. denied*, 429 U.S. 1096 (1977).

Second, the Professional Investors are not indispensable parties. Their interests are adequately represented by Quinn-L and the 156 diverse investors, all of whom share the same interest in the determination of coverage as do the Professional Investors[6]. *See Isdaner v. Beyer*, 53 F.R.D. 4, 6 (E.D. Pa. 1971) (real possibilities of prejudice should govern the court's determination, rather than theoretical or technical differences among the parties). The defense provided by Boyd to Quinn-L and the investors will not be altered in the slightest manner with the joinder of the Professional Investors. *See Ahrendt v. Palmetto Federal Sav. & Loan Ass'n*, 680 F. Supp. 1125, 1130 (S.D. Ohio 1987) (denying motion to dismiss suit where the non-joined limited partners appeared to be "empty shells whose presence in this litigation would serve no purpose, particularly in light of the fact that the general partner . . . is now a Defendant"). Moreover, since the Professional Investors are equally bound by this Court's judgment,

---

[6] Attorney Sam Boyd represents the remaining 156 investors, and Quinn-L in this case. Boyd had previously represented all of the investors, including the Professional Investors, in the Federal Liability Suits, and in the motion to intervene in the First Federal Declaratory Judgment Action.

there exists no possibility of duplicative litigation, or inconsistent obligations. *See* F.R.C.P. 19.

Accordingly, Quinn-L's Motion to Dismiss is hereby **DENIED.**

III. Motion for Continuance and Reopening of Discovery

Quinn-L moves for continuance pursuant to F.R.C.P. 56(f) and for reopening of discovery due to Royal's alleged failure to produce over 1,000 documents[7].

In its August 29, 1991 Order, the Court denied Quinn-L's motion, submitted on similar grounds, for Continuance and for Reopening of Discovery. *See* Memorandum Opinion and Order, August 29, 1991. Similarly, on October 28, 1991 the Court denied Quinn-L's Third Motion to Compel Expedited Production of Documents. *See* Order, October 28, 1991. The findings of fact and conclusions of law outlined in the Court's Orders are incorporated herein by reference.

Accordingly, Quinn-L's motion is hereby **DENIED.**

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[7] This portion of Quinn-L's Motion regarding Reopening of discovery was referred to Magistrate Judge Sanderson by a September 30, 1991 Order of Reference. The Order of Reference is hereby stricken, and both portions of the Motion, the discovery and Rule 56(f) Supplement, are before this Court.

IV. Motion for Summary Judgment

a. Parties' Contentions

Royal moves for summary judgment on all of the claims and affirmative defenses asserted in this case on the following grounds,

> 1. Any claim that Royal is liable to Quinn-L for all, or any portion of, the $741 million *Adkisson* default judgment is barred by the Final Judgment;
>
> 2. Each of the affirmative defenses asserted by Quinn-L is insufficient as a matter of law to impose any liability on Royal, because Royal's policies do not cover the claims that were the basis for the $741 million default judgment, and Royal's actions were not the cause of that judgment; and
>
> 3. The representations of the Dunn-Odom Insurance Agency are insufficient, as a matter of law, to create liability.

See Royal's June 30, 1990 Memorandum at 4.

Quinn-L opposes summary judgment on the following grounds,

> 1. Quinn-L is not barred from asserting its claims in *Adkisson* by the Final Judgment, because (a) Royal cannot overcome the Anti-Injunction Act; and (b) the Investors are not bound by the Judgment;
>
> 2. Royal is not entitled to summary judgment on the affirmative defenses asserted by Quinn-L because (a) the defenses of bad faith, waiver and estoppel are not properly before this Court; and (b) Royal, in any event, by its conduct, has

waived or is estopped from relying on the alleged preclusive effect of the Final Judgment.

3. Royal is not entitled to summary judgment on the claim regarding the Dunn-Odom Insurance Agency's representations because (a) this claim is not properly before this Court; and (b) in any event, pursuant to Texas law, the statements of the Agency have effectively waived the written terms of the policy.

See Quinn-L's October 1, 1991 Opposition Brief at 6-51.

b. Standard

"Summary judgment reinforces the purpose of the Rules, to achieve the just, speedy, and inexpensive determination of actions, and, when appropriate, affords a merciful end to litigation that would otherwise be lengthy and expensive." *Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1197 (5th Cir. 1986).

Summary judgment is proper when the pleadings and evidence on file show that no genuine issue exists as to any material fact and that the moving party is entitled to judgment or partial judgment as a matter of law. *See* Fed. R. Civ. P. 56. As the Fifth Circuit stated in *Christophersen v. Allied-Signal Corp.*, 902 F.2d 362, 364 (5th Cir. 1990), "[b]efore a court may grant summary judgment, the moving party must demonstrate that it is entitled to judgment as a matter of law because there is no actual dispute as to an essential element of the plaintiff's case."

The threshold inquiry, therefore, is "whether . . . there are any genuine factual issues that properly can be resolved only by a finder of fact because they may

reasonably be resolved in favor of either party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251 (1986). A movant for summary judgment need not support the motion with evidence negating the opponent's case. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). Rather, the burden is on the respondent to the motion to make a showing sufficient to establish each element as to which he will have the burden of proof at trial, provided that he has an adequate opportunity for discovery. *See id.* at 324. All evidence, however, must be viewed in the light most favorable to the motion's opponent. *See Gremillion v. Gulf Coast Catering Co.*, 904 F.2d 290, 292 (5th Cir. 1990).

The party who opposes a motion for summary judgment, Quinn-L in this case, must point out specific facts showing that there is a genuine issue for trial.

> Factual specificity is required because summary judgment is designed to go beyond the pleadings in order to assess the proof and ascertain whether a claim is baseless and should be dismissed or, alternatively, whether a genuine fact issue exists and trial is necessary. Because the opponent of a summary judgment motion must designate specific facts, it is not enough that he merely restate his claims – general allegations and self-serving conclusions unsupported by specific facts are not adequate.

Castillo v. Bowles, 687 F. Supp. 277, 280 (N.D. Tex. 1988), *cert. denied*, 110, 493 U.S. 827 (1989) (citations omitted).

c. Analysis

The Court considers Quinn-L's three arguments in opposition to summary judgment seriatim. Each of the three arguments have multiple sub-parts.

Quinn-L's First Argument:

In its first argument, Quinn-L asserts that the Final Judgment does not bar its claims in *Adkisson* because (1) Royal does not meet the requirements of the Anti-Injunction Act; (2) *Adkisson* presented completely new facts and causes of action for judicial consideration; (3) the Final Judgment did not bind the Investors.

First, in reliance on *Texas Employers' Ins. Ass'n v. Jackson*, 862 F.2d 491 (5th Cir. 1988) (en banc), Quinn-L argues that it is not barred from asserting that Royal is liable for the claims in *Adkisson* by the Final Judgment, because Royal cannot overcome the Anti-injunction Act. In effect, Quinn-L argues that Royal is not entitled to declaratory relief since it cannot comply with the requirements of that Act.

The pertinent issue in *Texas Employers* was whether a district court that was barred by the Anti-injunction Act from issuing an injunction against prosecution of a state suit could nevertheless grant a declaratory judgment that would render all the state suit claims invalid. The Court in *Texas Employers* held that if an injunction would be barred by the Anti-Injunction Act, this should also bar the issuance of a declaratory judgment *that would have the same effect as an injunction. See id.* at 505-08.

Quinn-L's argument and reliance on *Texas Employers* is misplaced. Royal's motion for summary judgment is limited to a consideration of Royal's duty to defend or indemnify against the claims asserted in *Adkisson*; it is not the type of declaratory judgment that interferes with the prosecution of a state suit precluded by *Texas Employers*. Royal's motion for summary judgment in regard to the claims asserted in *Adkisson* stands separate and independent from its motion seeking declaratory and permanent injunctive relief in regard to the Brownsville actions. The Anti-injunction Act is not applicable to Royal's motion for summary judgment, and has no bearing on the preclusive effects of this Court's Final Judgment on Royal's duty to defend or indemnify the claims asserted in *Adkisson*. The Act will become relevant only in determining whether Royal is entitled to a permanent injunction in the Brownsville actions.

Second, Quinn-L argues that the Final judgment was limited to the specific facts, issues and parties before the Court at the time of the Judgment, *see Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 150 (1988), and thus does not bar the claims asserted in *Adkisson*. More specifically, Quinn-L claims that the Final Judgment (1) did not address allegations of mental anguish under the policy, and (2) did not bind the Investors. The First Amended Original Petition in *Adkisson*, Quinn-L argues, raised causes of action and relied on factual allegations completely different from those alleged in the Federal Liability Suits.

With particular reference to the Investors' First Amended Original Petition in *Adkisson*, this Court previously has found that

> [l]ike the Federal Liability Suits, [*Adkisson*] alleged fraud, constructive fraud, negligence, breach of contract, breach of fiduciary duties, civil conspiracy, negligent misrepresentation, violations of the Texas Securities Act and Texas Deceptive Trade Practices Act, exemplary damages and attorney's fees. The [*Adkisson*] action was based on the same transactions as were the earlier Federal Liability Actions. In fact, the [Intervenor Plaintiffs] explicitly stated that the state-law claims brought in [*Adkisson*] were the same state-law claims originally brought in the Federal Liability Suits.

Royal 759 F. Supp. at 1223 (citations omitted).

Further, contrary to Quinn-L's allegation, the issues concerning mental anguish have been previously litigated before this Court. In the Partial Summary Judgment, the Court found that despite Quinn-L's allegation that mental anguish claims were covered by the policies at issue in the Federal Liability Suits, Quinn-L had failed to show that personal injuries in the form of mental anguish were caused by an "occurrence" as required by the policy. *See* Memorandum Opinion and Order entered April 14, 1989 at 2-3. Moreover, in *Royal*, the Court revisited the mental anguish claim and stated,

> The Investors contend that it was not until the [Adkisson] State Action that they "pleaded claims for mental anguish and mental injuries as damages for negligent and or grossly negligent acts of the Quinn-L Entities." In addition, the Investors seem to place great stock in their contention that Royal also believed that mental

> anguish and mental injury were not issues before the Court in the Federal Actions.[8]
>
> What matters, of course, is not what the parties thought, but what they actually presented to the Court for determination and what the Court actually decided. The record clearly shows that the issue of mental anguish was fully litigated in the [First] Federal Declaratory Judgment Action and was necessary to the Final Judgment entered in that case.

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[8] In the present motion, Quinn-L similarly devotes considerable effort to demonstrate that at the time of the Partial Summary Judgment Motion Royal argued that the Investor Plaintiffs had not alleged claims for mental anguish in the Federal Liability Suits; and that this stands in stark contrast to Royal's position in the present motion for summary judgment. *See* Quinn-L's Opposition Brief at 12-29.

There is no probative value to Quinn-L's distinction. Contrary to what Quinn-L suggests, the determination made by the Court in the Partial Summary Judgment could not have been limited to whether mental anguish claims were or were not *alleged* in the Federal Liability Suits, but rather extended necessarily to a consideration of whether Royal's policy did or did not cover such allegations. Quinn-L's pleadings directly put the issue of mental anguish before the Court for consideration and determination. *See* PX B-4 at 3; PX B-5 at 7, 9; PX B-6 at 6; PX A-1 at 2. As the Fifth Circuit has recognized, a district judge is "peculiarly qualified to compare the issue [and] determine the question of relitigation" when his own prior judgment is involved. *Southern California Petroleum Corp. v. Harper*, 273 F.2d 715, 719 (5th Cir. 1960).

Royal, 759 F. Supp. at 1222 n.6 (citations omitted). The preclusive effects of the Final Judgment clearly encompass the claims surrounding coverage of mental anguish under the policy.[9]

Third, Quinn-L alleges that the Investors brought the *Adkisson* action as judgment creditors, and not merely as Quinn-L's assignees, and therefore are not bound by the terms of the Final Judgment entered against Quinn-L. As judgment creditors, Quinn-L argues, the Investors had a *direct* cause of action against Royal pursuant to the policies' express terms, that were not effected by the Final Judgment.

As a preliminary matter, a judgment creditor who is also an assignee (Investors) has no direct and independent right of action against the insurer (Royal) greater than the rights of the assignor (Quinn-L). In *Davis v. Dairyland County Mutual Insurance Co.*, 582 S.W.2d 591, 593 (Tex. Civ. App. – Dallas 1979, writ ref'd n.r.e.), the Court held that an assignee, who is also a judgment creditor, could not relitigate a prior judgment because an

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[9] Quinn-L states,

> [I]n evaluating the judgment's scope it must be remembered that the Investors' federal liability suits against Quinn-L were dismissed *prior* to the entry of final judgment in the first declaratory action. Accordingly, there were "no pending suits" against Quinn-L when the declarations were made.

Quinn-L's Opposition Brief at 16 (emphasis added).
Quinn-L's distinction is completely irrelevant in determining the scope of the Final Judgment for it is obvious that the Final Judgment is premised on the Partial Summary Judgment entered *prior* to dismissal of the Federal Liability Suits.

assignee "can stand in no better position than" his assignor."[10]

The Final Judgment clearly delineated the rights of Quinn-L, the assignor, in finding that Royal's policies did not impose any duty to defend or indemnify Quinn-L against the Investors' claims in the Federal Liability Suits. And as discussed above, the Investors' claims in *Adkisson* are the same as those asserted in the Federal Liability Suits. Royal's duty to the Investors can in no event exceed its duty to Quinn-L.

Finally, the Court has already determined that the Investors and Quinn-L are in privity, and thus equally bound by the Final Judgment. *See* Royal 759 F. Supp. at 1232. In its determination, the Court specifically found that (1) the interests of the Investors was adequately represented by Quinn-L in the First Federal Declaratory Judgment Action; (2) the Investors had control over

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[10] The cases Quinn-L relies on for its proposition that the Investor Plaintiffs have an independent right of action against Royal are clearly distinguishable from the circumstances before the Court where the judgment creditor (the Investors) is also an assignee, and the insurer (Royal) has been determined to have no coverage duties toward the assignor (Quinn-L). *See Seguros Tepeyac, S.A., Compania Mex. v. Bostrom*, 347 F.2d 168, 172 (5th Cir. 1965) (judgment creditor took assignment only *after* trial on its claims as judgment creditor in coverage action against insured); *Burton v. State Farm Mut. Auto. Ins. Co.*, 335 F.2d 317, 325 (5th Cir. 1964) (applying Florida law, court notes that judgment creditors (who were not assignees) would not be bound by judgment against insured); *Dairyland County Mut. Ins. Co. v. Childress*, 650 S.W.2d 770, 773 (Tex. 1983) (involved a judgment creditor only).

Quinn-L; and (3) the Investors were assignees of Quinn-L's rights against Royal. *See id.*

In sum, Quinn-L's first argument in opposition to summary judgment is without merit. The Final Judgment covers all the same facts, claims, issues and parties at issue in *Adkisson*. The doctrines of collateral estoppel and res judicata effectively preclude relitigation of these issues and claims. *See Meza v. General Battery Corp.*, 908 F.2d 1262, 1265-66 (5th Cir. 1990) (res judicata bars the relitigation of claims that were finally resolved on the merits in an earlier action between the same parties or their privies); *International Ass'n of Machinists & Aerospace Workers v. Nix*, 512 F.2d 125, 132 (5th Cir. 1975) (collateral estoppel bars the relitigation of issues that were "actually litigated" in a prior action and were "necessary and essential to the resulting judgment.")

Quinn-L's Second Argument:

In its second argument, Quinn-L claims that Royal is not entitled to summary judgment on the affirmative defenses asserted by Quinn-L because (1) the defenses of bad faith, waiver and estoppel are not properly before this Court; and (2) Royal, in any event, by its conduct, has waived or is estopped from relying on the alleged preclusive effect of the Final Judgment.

At the outset, the Court notes that the affirmative defenses of estoppel, waiver and contributory negligence are clearly before this Court as evidenced by Quinn-L's Answer in this case. *See supra* page at 8. The affirmative defense of contributory negligence asserted in the present action for all purposes correlates with that of bad faith

asserted in *Adkisson* and the Brownsville State Actions. In both instances the defense amounted to a breach of the duty of good faith and fair dealing, and was based on Royal's denial of coverage and defense to Quinn-L[11].

In reliance upon *Arnold v. National County Mut. Fire Ins. Co.*, 725 S.W.2d 165 (Tex. 1987), Quinn-L argues that "an insurer may still be held liable for bad faith for failing to investigate, even if the denial itself was on a proper basis when viewed in hindsight." Quinn-L's Opposition Brief at 34. However, cases subsequent to *Arnold* have established that a bad faith claim requires *both* a finding that the insurer did not have a reasonable basis for the denial of coverage *and* a finding that the insurer knew or should have known that fact, *see Aranda v. Insurance Co. of N. Am.*, 748 S.W.2d 210, 213 (Tex. 1988); and that the conjunctive test of *Aranda* controls over the disjunctive test of *Arnold*, *see Automobile Ins. Co. v. Davila*, 805 S.W.2d 897, 904 (Tex. App. – Corpus Christi 1991, writ denied). Furthermore, an absence of coverage defeats a bad faith claim. *See Reliance Ins. Co. v. Capital Bancshares, Inc./Capital Bank*, 912 F.2d 756 (5th Cir. 1990), *aff'g* 685 F. Supp. 148, 149 n.2 (N.D. Tex. 1988). In view of the Final

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[11] Defendants' interrogatory answers indicate that the factual basis for their contributory negligence claim in the federal action is that "Royal wrongfully denied coverage and wrongfully refused to provide a proper defense to Quinn-L", *see* PX C-11 at 22, 25; and that the factual basis for their bad faith claim in the state action is "Royal's wrongful denial of coverage and wrongful refusal to defend", *see* PX B-30 at 9-10. For the purposes of clarity, from hereon the Court will refer only to the claim for bad faith as being synonymous with that of contributory negligence.

Judgment determining a lack of coverage, Royal's denial of unqualified coverage was clearly reasonable, and immune from allegations of bad faith.

Second, Quinn-L bases its claims of waiver and estoppel on three assertions: (1) Royal's failure to prove an entitlement to either collateral estoppel or res judicata in this action; (2) Royal's representations to Quinn-L and conduct regarding the scope of the Final Judgment; and (3) Royal's defense of *Adkisson*. The first assertion has already been addressed, and Royal is clearly entitled to collateral estoppel and res judicata in regard to the claims asserted in *Adkisson*. The only issues remaining for consideration involve Royal's conduct subsequent to entry of the Final Judgment.

Relying on *Van Den Broeke v. Bellanca Aircraft Corp.*, 576 F.2d 582, 584 (5th Cir. 1978), Quinn-L argues that "Royal's conduct with respect to the scope of the judgment was so inconsistent with its present position as to constitute a waiver, as a matter of law, of the right to claim that the federal complaints alleged mental anguish and that the declaratory judgment determined such allegations are not covered under the policies." Quinn-L's Opposition Brief at 36-37. Quinn-L argues that it was harmed by Royal's representations as to the scope of the Final Judgment, because Quinn-L relied on these representations and did not appeal or seek relief from the Judgment.

Quinn-L's reliance on *Van Der Broeke* is inapposite. *Van Der Broeke* stands for the proposition that under the

Mississippi Commercial Code unless disclaimers of warranty are disclosed and agreed upon prior to the contractual agreement, they are not binding. *See id.* at 584. It further held that Plaintiff's actions did not amount to waiver of its right to implied warranties for they did not constitute voluntary and intentional relinquishment of a known right, as required by the Code. *See id.*

Apart from the complete inapplicability of the Mississippi Commercial Code, the representations made by Royal upon which Quinn-L relies for its waiver claim do not constitute voluntary and intentional relinquishment of a *known* right[12]. In a letter to Quinn-L dated November 14, 1989 Royal stated,

> Royal has also concluded that no coverage exists for the allegations of "mental anguish" and "mental injury" in the present action, which were not adjudicated in the prior declaratory action.

Defendants' Exhibit ("DX") E-4 at 4-5.

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[12] Quinn-L relies on representations made by Royal both before *and* after entry of the Final Judgment. However, the fact that Royal represented to Quinn-L and the Court that the claim of mental anguish was not present in the Federal Liability Suits, prior to entry of the Final Judgment, is simply irrelevant for the purpose of determining waiver of a known right. As already discussed, the Final Judgment encompassed the claim of mental anguish presented in the Adkisson State Action, and it is clearly what the Court decided that prevails over what any individual party thought. For this reason, in addressing Quinn-L's claims of waiver, the Court will focus solely on representations made subsequent to the Final Judgment.

Royal's representation is testimony to a mistaken understanding of the scope of the Final Judgment and the rights it secured Royal, and for this reason can not constitute voluntary relinquishment of a *known* right.

Moreover, any harm resulting from Quinn-L's inaction in regard to the Final Judgment was not due to any representation made by Royal, but was rather an outcome of Quinn-L's independent decision and conduct. The first representation made by Royal to Quinn-L occurred on November 14, 1989, already past the thirty days allotted for direct appeal from the September 8, 1989 Final Judgment[13]. *See* Federal Rule of Appellate Procedure 3. Furthermore, Royal initiated this suit disputing the duty to defend or indemnify against *any* of the claims in *Adkisson*, including that of mental anguish, on March 9, 1990; thus putting Quinn-L clearly on notice of Royal's intent to include the mental anguish claim within the scope of the Final Judgment within the one year time period allowed

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[13] Quinn-L also relies on an earlier communication, occurring post Final Judgment on September 21, 1989, where Royal instructs Quinn-L to forward any suit papers in regard to *Adkisson* to Royal for review should Quinn-L intend to request that a defense be provided. *See* DX 1-D. Royal expressly states, however, that "[t]his letter is not intended and should not be construed as a waiver of any rights which Royal has or may have under the policies in regard to the suits which were pending in the Northern District of Texas, or any other suits which are pending or which may be brought." *Id.* To the extent that the September communication provides no indication of Royal's belief at the time that the Final Judgment did not cover claims of mental anguish, it could not have influenced Quinn-L's decision not to appeal the Final Judgment.

Quinn-L to seek relief from the Final Judgment. *See* Federal Rule of Civil Procedure 60(b).

Quinn-L further argues that Royal voluntarily waived its right to challenge coverage, and in fact created coverage when Royal defended Quinn-L in *Adkisson*. However, the cases upon which Quinn-L relies for its argument clearly limit waiver and estoppel to situations where the insurer has provided a defense *without* notifying its insured that it intends to contest coverage, thereby misleading the insured to his detriment when a conflict of interest may result. *See Arkwright-Boston Mfrs. Mut. Ins. Co. v. Aries Marine Corp.*, 932 F.2d 442, 445 (5th Cir. 1991); *Pacific Indem. Co. v. Acel Delivery Serv., Inc.*, 485 F.2d 1169, 1173 (5th Cir. 1973), *cert. denied*, 415 U.S. 921 (1974); *Farmers Texas County Mut. Ins. Co. v. Wilkinson*, 601 S.W.2d 520, 522 (Tex. Civ. App. – Austin 1980, writ ref'd n.r.e.); *Western Casualty & Sur. Co. v. Newell Mfg. Co.*, 566 S.W.2d 74, 76-77 (Tex. Civ. App. – San Antonio 1978, writ ref'd n.r.e.).

The record clearly establishes that Royal's offer of defense in *Adkisson* was always subject to a reservation of rights[14]. *See Royal*, 759 F. Supp. at 1223-26. Once Royal's

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[14] Quinn-L argues that since Royal's reservation of rights did not put forth the Final Judgment as its basis, Royal has waived its right to rely on such reservation, citing *Farmers Texas County Mutual Ins. Co. v. Wilkinson*, 601 S.W.2d 520, 523 (Tex.Civ.App. – Austin 1980, writ ref'd n.r.e.); and *Western Cas. & Sur. Co. v. Newell Mfg. Co.*, 566 S.W.2d 74, 78 (Tex.Civ.App. – San Antonio 1978, writ ref'd n.r.e.). *See* Quinn-L Opposition Brief at 42. However, both of these authorities stand for the proposition that where reservation of rights are ambiguous, they should be construed strictly. The fact that Royal did not

offer of qualified defense was rejected by Quinn-L, Royal directed Johnston to take no further action on behalf of Quinn-L in *Adkisson*.

Furthermore, in order for waiver to occur, the courts have required a showing that the insured was harmed by the insurer's conduct of assuming the insured's defense. *See State Farm Lloyds, Inc. v. Williams*, 791 S.W.2d 542, 552 (Tex. App. – Dallas 1990, writ denied); *Pacific Indemnity*, 485 F.2d at 1173. Quinn-L has failed to demonstrate that Royal's qualified defense of *Adkisson* in any way has harmed Quinn-L. Johnston's limited offer of defense in *Adkisson* did not prejudice Quinn-L in any significant way[15]. In fact,

> [a]lthough Lovell, on behalf of Quinn-L, denies ever having authorized Johnston to appear in [*Adkisson*], Lovell has admitted that he, too, would have denied the Plaintiffs' allegations. Indeed, Lovell expressed to Johnston his appreciation for Johnston's efforts in the litigation.

Royal, 759 F.Supp. at 1224 (citations omitted). In the absence of Johnston, as Quinn-L admits, "[it] is unlikely that any attorney would have undertaken Quinn-L's defense in the massive suit without assurance that Quinn-L could pay." *See* Quinn-L's Opposition Brief at 45-46.

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expressly rely on the Final Judgment as a basis for its qualified defense in no way renders Royal's reservation of rights ambiguous.

[15] Johnston's conduct in *Adkisson* is limited to a general denial to the Investors' Complaint and 600 Requests for Admission.

Johnston's limited involvement did not precipitate nor could it have avoided the *Adkisson* default judgment. The default judgment was a direct result and intended outcome of the Settlement Agreement between the Investors and Lovell. *See Royal*, 759 F.Supp. at 1226.

In sum, Quinn-L's second argument in opposition to summary judgment also fails. The affirmative defenses of bad faith, estoppel and waiver can not create coverage where Royal has no duty to defend or indemnify Quinn-L against the claims asserted in *Adkisson*, and Royal's actions were not the cause of the *Adkisson* Default Judgment.

Quinn-L's Third Argument:

In its third argument, Quinn-L claims that Royal is not entitled to summary judgment on the claim regarding the Dunn-Odom Insurance Agency representations because (1) this claim is not properly before this Court, and is rather a basis for affirmative relief in *Adkisson;* and (2) in any event, pursuant to Texas law, the statements of the Agency have effectively waived the written terms of the policy.

First, the record clearly indicates that the representations made by the Agency are part and parcel of Quinn-L's waiver claim for affirmative relief asserted in Quinn-L's Answer. *See* Answer, PX C-2 ¶ 29; and Quinn-L's Answers to Interrogatories PX C-11 at 23-24, and PX C-12 at 24. As a result, the claim regarding the representations made by the Agency are properly before this Court.

Second, Quinn-L relies on *Black v. Victoria Lloyds Ins. Co.*, 797 S.W.2d 20, 26 (Tex. 1990) for the proposition that an agent with authority to bind the insurer concerning coverage may waive exclusionary provisions of an insurance policy by a later representation at variance with the written terms of the policy. However, Quinn-L fails to establish two elements necessary to bring the instant circumstances under the purview of *Black*.

Quinn-L presents no proof that Odom is an authorized agent of Royal. Under Texas law, an agent from whom insurance is procured is not necessarily an authorized agent, who alone can bind the insurer. *See Royal Aviation, Inc. v. Aetna Casualty & Sur. Co.*, 770 F.2d 1298, 1300 (5th Cir. 1985).

Quinn-L also fails to advance proof for its allegation that the representations made by Odom constituted a departure from the terms of the policy, and amounted to coverage of the losses asserted against Quinn-L by the Investor-Plaintiffs. In fact, Lovell's testimony reveals that his conversations with Odom revolved around a consideration of insurance coverage, generally, and never of coverage for the Investors' claims against Quinn-L, specifically. *See* PX A-25 at 57, 75-76, 189-91, 195-96.

Statements of such a general nature are insufficient as a matter of law to create coverage. *See Employers Casualty Co. v. Fambro*, 694 S.W.2d 449, 452 (Tex. App. – Eastland 1985, writ ref'd n.r.e.) (general statements regarding the adequacy or sufficiency of coverage are not enough to create coverage for specific losses); *Parkins v. Texas Farmers Inc. Co.*, 645 S.W.2d 775, 777 (Tex. 1983) (claimant must show that the insurer promised coverage against the

specific loss at issue). Moreover, under Texas law, the doctrine of waiver generally can not be used to create coverage where none exists under the terms of the policy. *See Texas Farmers Ins. Co. v. McGuire*, 744 S.W.2d 601, 602-03 (Tex. 1988).

In sum, Quinn-L's final argument against summary judgment also fails. The representations of the Dunn-Odom Insurance Agency are insufficient, as a matter of law, to create liability where non [sic] exists.

The Court is of the opinion that Royal is entitled to summary judgment as a matter of law as to all claims and affirmative defenses asserted in this action. The Final Judgment bars any claim that Royal is liable to Quinn-L for all, or any portion, of the default judgment entered in *Adkisson*.

Accordingly, Royal's Motion for Summary Judgment is GRANTED[16].

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[16] Royal moves to strike all or portions of several affidavits submitted by Quinn-L in its opposition to summary judgment: affidavits of Samuel L. Boyd, Joseph A. Wilkerson, Wayne Swift, Mark W. Romney and S. Mark Lovell. Royal moves to strike those portions that are inadmissible, improper and constitute expert legal testimony by undesignated persons. The Court notes that the affidavits are replete with inadmissible testimony in violation of F.R.C.P 56(e). *See, generally*, Royal's Memorandum in Support of Motion to Strike and supporting exhibits. The Fifth Circuit has clearly established that only evidence admissible at trial may be considered on summary judgment. *See Geiserman v. MacDonald*, 893 F.2d 787, 793 (5th Cir. 1990); *Lavespere v. Niagara Mach. & Tool Works, Inc.*, 910 F.2d 167, 175-76 (5th Cir. 1990). Furthermore, "because legal argumentation is an expression of legal opinion and is not a recitation of a 'fact' to

V. Declaratory and Permanent Injunctive Relief

Royal moves for declaratory and permanent injunctive relief to enforce this Court's Final Judgment, and to prevent that Judgment from being undermined by proceedings in the Brownsville state court. In its Order of November 30, 1990 the Court entered a preliminary injunction against further prosecution of the Brownsville Actions. The Court's grant of a preliminary injunction has been appealed to the Fifth Circuit.

Consideration of Royal's Application for Permanent Injunctive Relief is **DEFERRED** until the Fifth Circuit ruling.

V. Conclusion

For the reasons stated above, Quinn-L's Motion to Dismiss is **DENIED**; Quinn-L's Motion for Continuance and Reopening Discovery is **DENIED**; Royal's Motion for Summary Judgment is **GRANTED** as set forth; Royal's Motion to Strike is **GRANTED**; and Royal's Application for Permanent Injunctive Relief as to the Brownsville Actions is **DEFERRED**. Royal is **DIRECTED** to submit a proposed judgment in compliance with this order by noon, *December 31, 1991*.

SO ORDERED.

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which an affiant is competent to testify, legal argument in an affidavit may be disregarded." *Pfeil v. Rogers*, 757 F.2d 850, 862 (7th Cir. 1985).

Accordingly, Royal's Motion to Strike the aforementioned affidavits in their entirety is **GRANTED**.

DATED: December 20, 1991.

/s/ Barefoot Sanders
BAREFOOT SANDERS,
CHIEF JUDGE
UNITED STATES DISTRICT
COURT
NORTHERN DISTRICT OF
TEXAS

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ROYAL INSURANCE COMPANY OF AMERICA and ROYAL LLOYDS OF TEXAS	*	
Plaintiffs	*	Action No. 3-90-CV-0550-H
v.	*	
QUINN-L CAPITAL CORPORATION, *et al.*	*	
Defendants	*	

MEMORANDUM OPINION AND ORDER

(Filed July 1, 1992)

Before the Court are Plaintiffs'[1] Motion to Modify Order Striking Affidavits and For Entry of a Final Declaratory Judgment and Permanent Injunction and supporting memorandum, filed May 29, 1992; Plaintiffs' Amended Application For Permanent Injunctive Relief, filed May 29, 1992; Defendants' Motion to Vacate Summary Judgment and Brief in Support Thereof and Opposition to Plaintiffs' Motion, filed June 23, 1992; Plaintiffs' Opposition to Defendants' Motion, and Reply to Defendants' Opposition, filed June 29, 1992; Plaintiffs' Request

[1] For the purposes of this Order, the Plaintiffs in this action will be referred to as "Royal," and the multiple Defendants as "Quinn-L."

for Expedited Consideration of Pending Motions, filed June 29, 1992; a Letter from Defendants' counsel to the Court, filed June 29, 1992; a Letter from Plaintiffs' counsel to the Court, filed June 30, 1992; and a Letter from Defendants' counsel to the Court, filed June 30, 1992.

The Court need not again recite the tortuous history of this case which has been reviewed on past occasions. *See, e.g.*, Memorandum Opinion and Order filed December 20, 1991 ("December Order"); *Royal Ins. Co. v. Quinn-L Capital Corp.*, 759 F. Supp. 1216 (N.D. Tex. 1990). It is necessary only to pick up the thread where it was last left with the Court's December Order[2]. In its December Order, the Court issued a ruling on a number of pending motions, and specifically granted summary judgment in favor of Royal on its claims and all affirmative defenses asserted in this action. At the time, the Court deferred ruling on the only remaining issues which involved Royal's motion for declaratory and permanent injunctive relief pending decision on appeal of the Court's earlier grant of preliminary injunction.

On May 5, 1992 the Fifth Circuit affirmed the Court's entry of preliminary injunction based on the "relitigation" exception for all claims decided in the first declaratory judgment action; and reversed the Court's entry of preliminary injunction based on the "in aid of jurisdiction" exception for all claims arising from events subsequent to the first declaratory judgment action. *Royal Ins. Co. v. Quinn-L Capital Corp.*, 960 F.2d 1286 (5th Cir. 1992).

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[2] An interlocutory judgment was entered pursuant to the Court's December Order on January 29, 1992.

Additionally, as regards these post-declaratory judgment claims, the Fifth Circuit denied Quinn-L's motion to vacate this Court's December Order issued pending the preliminary injunction appeal which disposed of all such claims. *Id.* at 1300-01.

Royal now moves (1) to modify the Court's December Order striking in their entirety affidavits offered by Quinn-L in opposition to Royal's motion for summary judgment; (2) to make final the declaratory judgment entered by the Court on January 29, 1992; and (3) to enter a permanent injunction barring relitigation of the issues and claims that have been resolved in this action, and in *Royal Insurance Company of America, et al. v. O-L Investments, Inc., et al.*, No. CA-3-88-1069-H (N.D. Tex. 1989) ("First Declaratory Judgment").

First, Royal moves to modify the Court's December Order to the extent that it grants Royal's motion and strikes in their entirety the affidavits submitted by Quinn-L in opposition to summary judgment as inadmissible testimony in violation of Federal Rule of Civil Procedure 56(e). Fifth Circuit authority, subsequent to the Court's December Order, requires the district court to designate specifically the inadmissible portions of an affidavit to be stricken. *See Akin v. O-L Investments, Inc.*, 959 F.2d 521, 531 (5th Cir. 1992). Accordingly, the Court modifies its December Order by striking those portions of the affidavits specifically objected to by Royal and which the Court finds inadmissible.

Quinn-L agrees that striking the affidavits in their entirety was improper. However, Quinn-L additionally argues that the order granting summary judgment can no

longer stand in view of the modification, and moves on this basis to vacate the Court's December Order. The remaining portions of the affidavits, however, do not raise disputed issues of fact material to the grant of summary judgment[3], and to this extent the modification is of no consequence to the Court's December Order. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986).

Second, Royal moves for entry of a final declaratory judgment and permanent injunction. The predicate findings of fact and conclusions of law to a final declaratory judgment and permanent injunction have been set by the Court's December Order.

Quinn-L, however, argues that the Fifth Circuit's ruling on appeal, read in conjunction with *Texas Employers Ins. Ass'n v. Jackson*, 862 F.2d 491 (5th Cir. 1988) (en banc), *cert. denied*, 490 U.S. 1035 (1989), precludes granting such relief, and in fact, requires the vacating of this Court's December Order. *Jackson* stands for the proposition that

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[3] Quinn-L argues that the affidavits raise material issues of disputed fact as regards plaintiffs' allegations of fraud and conspiracy on the part of the party-defendants. The alleged fraud and conspiracy were not material to the Court's grant of summary judgment in its December Order.

Quinn-L further argues that the affidavits somehow raise a material issue of fact in regard to the privity of the approximately 157 investors, who at the origin of this case brought twenty six law suits against the Quinn-L entities, with Quinn-L. The issue of privity has been exhaustively analyzed by this Court and by the Fifth Circuit, *see Royal Ins. Co.*, 960 F.2d at 1297-98; December Order at 19-21; *Royal Ins. Co.*, 759 F. Supp. at 1232, and testimony to the effect that no formal agreement existed between the parties is simply immaterial to the judicial finding of privity on independent grounds.

"[i]f an injunction would be barred by [28 U.S.C.] § 2283, this should also bar the issuance of a declaratory judgment that would have the same effect as an injunction." *Id.* at 506. Based on the *Jackson* holding, Quinn-L argues that,

> Because the Fifth Circuit now has held that the Anti-Injunction Act prohibits this Court from enjoining the Defendants from prosecuting in state court their claims arising out of Royal's conduct occurring after the entry of the September 8, 1989 declaratory judgment, this Court is likewise barred from issuing any declaratory relief that would have res judicata effect in the state court actions based upon post-declaratory judgment events.

Defendants' Brief at 4-5.

It is clear that Quinn-L has failed to understand both the meaning of the Fifth Circuit ruling, and its implications for this case at this juncture. The Fifth Circuit found that the "in aid of jurisdiction" exception to the Anti-Injunction Act did not allow this Court to *enjoin* the state court's consideration of claims arising from post-declaratory judgment events. *Royal Ins. Co.*, 960 F.2d at 1298-1300. However, the Fifth Circuit specifically rejected Quinn-L's argument that this Court lacked authority to rule on such claims, and refused to set aside this Court's December Order which disposed of such claims. *Id.* at 1300-01. The combined effect of the Fifth Circuit holdings is that Quinn-L's victory "on the 'in aid of jurisdiction' question is a hollow one," *id.* at 1301, and not, as Quinn-L would have it, that this Court cannot finally adjudicate the post-declaratory judgment claims pending before it.

Quinn-L also argues that the injunctive relief requested by Royal is improper because Quinn-L's affirmative defenses are not before this Court, and this Court lacks jurisdiction over them. Such defenses, Quinn-L argues, were raised only with respect to Royal's request for declaratory relief, and not in response to Royal's subsequent request for injunctive relief. To this end, it is further argued, Royal's request for declaratory relief, as well as the affirmative defenses to this request, became moot once the Court held that the First Declaratory Judgment Action was dispositive of all coverage issues.

The image put forth by Quinn-L's argument is misleading and fragmented, as though the same players, claims and issues have repeatedly engaged before this Court in interactions isolated one from the other, instead of bound by a net of concerted and deliberate action. Certainly, Royal's request for declaratory judgment is not "moot" by virtue of this Court's reliance on its First Declaratory Judgment, but is merely a sequel to the series of events that have been unfolding in the past five years at great judicial and private cost. Thus it is no surprise that in ruling on Royal's present request for declaratory judgment, the Court retraces its past steps, and echoes much of its previous findings. What is "moot" are Quinn-L's attempts "to evade the jurisdiction of this Court, to emasculate its ability to decide the present case, and to evade its prior judgments." *Royal Ins. Co.*, 759 F.Supp. at 1236; *see also Royal Ins. Co.*, 960 F.2d at 1301.

Quinn-L put before this Court the same affirmative defenses it raised in state court subsequent to this Court's First Declaratory Judgment in 1989. The Court is required to consider, and has considered the affirmative defenses

raised by Quinn-L before granting the relief sought by Royal. *See Allied Mktg. Group, Inc. v. CDL Mktg. Inc.*, 878 F.2d 806, 811-12 (5th Cir. 1989); *TransWorld Airlines, Inc. v. American Coupon Exch. Inc.*, 913 F.2d 676, 680 (9th Cir. 1990). There is no question that this Court has jurisdiction over these affirmative defenses. *Royal Ins. Co.*, 960 F.2d at 1292-93, 1299; *see also* 13 Charles A. Wright *et al.*, *Federal Practice & Procedure* § 3523, at 82 (1984). Moreover, as the Fifth Circuit has recognized, there was always the possibility and, in fact, it was highly probable that this Court would reach judgment on the affirmative defenses prior to the Cameron County court. *Royal Ins. Co.*, 960 F.2d at 1300.

In its First Declaratory Judgment in 1989, the Court found that Royal's policies did not impose any duty to defend or indemnify Quinn-L for the claims asserted in the original actions brought by the investors, and the *Adkisson* action[4]. In this second declaratory judgment action, the Court on November 30, 1990 issued a preliminary injunction against further prosecution of the Brownsville actions[5]. In its December Order, the Court further found that (1) the investors are bound by the First Declaratory Judgment; (2) enforcement of the First

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[4] The *Adkisson* action refers to the case of *Adkisson v. Quinn-L Capital Corporation*, Cause No. 89-11030-M, instituted on September 14, 1989 in the 298th Judicial District Court of Dallas County.

[5] The "Brownsville Actions" refers to the two suits instituted by the investors against Royal on September 4, 1990 and September 17, 1990 in the 107th Judicial District, Cameron County, Texas.

Declaratory Judgment is not barred by Quinn-L's affirmative defenses of waiver, estoppel and contributory negligence; and (3) Royal has no liability to Quinn-L based upon or relating to Dunn-Odom's alleged representations regarding coverage.

For these reasons, the Court enters a final declaratory judgment in accordance with its interlocutory judgment of January 29, 1992. The Court additionally and pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2202, and the All Writs Act, 28 U.S.C. § 1651(a), permanently enjoins any relitigation of the claims and issues already resolved by its past declaratory judgments regarding Royal's liability for the *Adkisson* judgment[6]. The Court's injunction encompasses the Brownsville actions.

Finally, Royal requests expedited consideration of the pending motions in light of a state court action instituted on November 15, 1991, *Quinn-L Capital Corp. v. Johnston* (91-13811), which allegedly involves some of the issues already ruled upon by this Court in its December Order. *See* Plaintiffs' Request filed June 29, 1992; Letter from Plaintiffs' counsel filed June 30, 1992. Counsel for Quinn-L, on the other hand, writes the Court to request an "advisory" opinion on whether its orders affect the prosecution of the *Johnston* case. *See* Letters from Defendants'

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[6] Contrary to Quinn-L's assertion, the Anti-Injunction Act does not bar entry of a permanent injunction in this case. In fact the "relitigation exception" to the Anti-Injunction Act insulates from litigation in state courts, claims or issues which have been decided by the federal court. *See Royal Ins. Co.*, 960 F.2d at 1293-94 (quoting *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 147-48 (1988)).

counsel filed June 29, 1992 and June 30, 1990. The Court's past and present rulings require no further elaboration.

Royal's Motion to Modify Order Striking Affidavits and for Entry of a Final Declaratory Judgment and Permanent Injunction is **GRANTED**, and Quinn-L's Motion to Vacate Summary Judgment is **DENIED.**

Plaintiffs' Proposed Findings of Fact and Conclusions of Law, filed May 29, 1992, concisely and correctly reflect the reasoning and rulings in this case. *See Royal Ins. Co. v. Quinn-L Capital Corp.*, 960 F.2d 1286 (5th Cir. 1992); Memorandum Opinion and Order filed December 20, 1991; *Royal Ins. Co. v. Quinn-L Capital Corp.*, 759 F. Supp. 1216 (N.D. Tex. 1990). The Court therefore **ADOPTS** Plaintiffs' Proposed Findings of Fact and Conclusions of Law as its own.

Filed herewith are the following:

(1) Order Modifying December 20, 1991 Order Striking Affidavits;

(2) Final Declaratory Judgment; and

(3) Permanent Injunction Order.

SO ORDERED.

DATED: July 1, 1992.

/s/ Barefoot Sanders
BAREFOOT SANDERS,
CHIEF JUDGE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ROYAL INSURANCE COMPANY OF AMERICA AND ROYAL LLOYDS OF TEXAS, Plaintiffs,	)	Civil Action No. CA3-90-0550-H
v.	)	
QUINN-L CAPITAL CORPORATION, et al., Defendants.	)	

JUDGMENT

(Filed Jan. 29, 1992)

In this action, plaintiffs Royal Insurance Company of America and Royal Lloyds of Texas seek to enforce a declaratory judgment entered by this Court on September 8, 1989. Plaintiffs moved for summary judgment pursuant to Rules 56 and 57 of the Federal Rules of Civil Procedure and 28 U.S.C. §§ 2201 and 2202. On December 20, 1991, the Court entered its Memorandum Opinion and Order (1) concluding that there is no genuine issue of material fact and that plaintiffs are entitled to judgment as a matter of law and (2) granting plaintiffs' motion for summary judgment. The Court also deferred consideration of Royal's application for permanent injunctive relief until a ruling by the Fifth Circuit in defendants' appeal of the preliminary injunction entered by the Court on November 30, 1991.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED as follows:

1. Any claim that Royal[1] is liable to Quinn-L or the Investors for all or any portion of the default judgment entered in Cause No. 89-11030-M in the District Court of Dallas County, Texas, 298th Judicial District, entitled *Mike Allen Adkisson, et al. v. Quinn-L Capital Corporation, et al.* (the "*Adkisson* action"), is barred by the Court's September 8, 1989 Final Judgment in No. CA3-88-1069-H, entitled *Royal Insurance Company of America v. O-L Investments, Inc., et al.* (the "Final Judgment").

a. The Final Judgment conclusively determined that Royal owed no duty to defend or to indemnify Quinn-L for any claims of property damage or personal injury, including mental anguish, arising from the claims of approximately 157 investors against Quinn-L in the federal actions before this Court in cause numbers 3-87-1384-H, 3-87-1589-H, 3-87-1873-H, 3-87-2113-H through 3-87-2133-H, 3-87-3068-H and 3-88-1153-H (the "Federal Liability Actions").

b. The Final Judgment conclusively determined Royal's obligations to Quinn-L under all

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[1] For purposes of this Judgment, plaintiffs Royal Insurance Company of America and Royal Lloyds of Texas, together with their affiliated companies, will be referred to collectively as "Royal"; defendants Quinn-L Capital Corporation, Quinn-L Financial Corporation, Quinn-L Equities, Inc., Quinn-L Management Corporation and Quinn-L Mortgage Company will be referred to collectively as "Quinn-L"; and the remaining defendants who have appeared in this litigation will be referred to collectively as "the Investors".

insurance policies issued to Quinn-L by Royal or any of its affiliated companies.

c. Whether Royal owed a duty to defend or to indemnify Quinn-L for any claims of property damage or personal injury including mental anguish, arising from the claims asserted in the Federal Liability Actions was fully and fairly litigated in CA3-88-1069-H, and the Court's determination that Royal owed no such duty to defend or to indemnify Quinn-L under any insurance policy issued to Quinn-L by Royal or any of its affiliated companies was necessary and essential to the Final Judgment.

d. The Final Judgment covers all of the same facts, claims and issues as the *Adkisson* action.

e. The doctrines of collateral estoppel and res judicata preclude relitigation of findings in the Final Judgment that Royal had no duty to defend or to indemnify Quinn-L for any of the claims asserted by the Investors in the *Adkisson* action under any insurance policy issued to Quinn-L by Royal or any of its affiliated companies.

f. Quinn-L and the Investors are in privity and are equally bound by the Final Judgment.

g. Since the final Judgment determined there was no coverage under any policies issued to Quinn-L by Royal or any of its affiliated companies for any claims asserted by the Investors in the *Adkisson* action, Royal's denial of an unqualified defense to Quinn-L was reasonable and therefore immune from allegations of bad faith; Quinn-L and the Investors are consequently barred by the Final Judgment from

asserting or maintaining a claim for bad faith or contributory negligence against Royal based upon or relating in any manner to the default judgment entered in the *Adkisson* action.

h. In the absence of coverage for the claims asserted by the Investors in the *Adkisson* action, the conduct of Royal or its putative agents after entry of the Final Judgment, which Quinn-L and the Investors assert as bases for their affirmative defenses of estoppel, waiver and bad faith or contributory negligence, did not create any coverage for the claims asserted in the *Adkisson* action under any policies issued to Quinn-L by Royal or any of its affiliated companies.

2. Enforcement of the Final Judgment is not barred by the affirmative defenses asserted by Quinn-L and the Investors.

a. Quinn-L's and the Investors' affirmative defenses of estoppel, waiver and bad faith or contributory negligence are before the Court.

b. The actions of Royal or its putative agent, Coyt Randal [sic] Johnston, did not cause the default judgment entered in the *Adkisson* action or any other alleged injury to Quinn-L.

c. The actions of the Investors and S. Mark Lovell caused the default judgment in the *Adkisson* action or any other alleged injury to Quinn-L.

d. Quinn-L and the Investors failed to establish any genuine issue of material fact as to whether Royal or its putative agents caused the default judgment in the *Adkisson* action or any other alleged injury to Quinn-L; Quinn-L and

the Investors consequently failed to meet their summary judgment burden as to an essential element of each of their affirmative defenses.

3. Royal has no liability to Quinn-L or the Investors based upon or relating in any manner to alleged representations regarding coverage made by the Dunn-Odom Insurance Agency.

4. Based on the Court's determinations set forth above, Royal has no liability to Quinn-L or the Investors based upon or relating in any manner to the default judgment entered in the *Adkisson* action or any other alleged injury to Quinn-L.

5. The Court retains jurisdiction of this matter (a) to consider Royal's application for permanent injunctive relief and (b) to the extent otherwise necessary to enforce its judgments.

DATED: January 29, 1992.

/s/ Barefoot Sanders,
BAREFOOT SANDERS,
CHIEF JUDGE
UNITED STATES
DISTRICT COURT
NORTHERN DISTRICT
OF TEXAS

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ROYAL INSURANCE COMPANY OF AMERICA AND ROYAL LLOYDS OF TEXAS,	)	
Plaintiffs,	)	Civil Action No. 3:90-CV-0550-H
v.	)	
QUINN-L CAPITAL CORPORATION, et al.,	)	
Defendants.	)	

PERMANENT INJUNCTION ORDER

(Filed July 1, 1992)

On May 29, 1992, plaintiffs Royal Insurance Company of America and Royal Lloyds of Texas ("Royal") filed their amended application for permanent injunctive relief and motion for entry of a permanent injunction. The Court has reviewed and considered the record relating to the amended application and the motion and is of the opinion that they should be granted.

IT IS, THEREFORE, ORDERED that the plaintiffs' amended application for permanent injunctive relief and motion for entry of permanent injunction are GRANTED, and all defendants, those in privity with them, their officers, agents, servants, employees and attorneys, and those persons in active concert or participation with them who receive actual notice of this order, specifically

including any non-party Investors who are or were plaintiffs in *Mike Allen Adkisson, et al. v. Quinn-L Capital Corporation, et al.*, Cause No. 89-11030-M, in the District Court of Dallas County, Texas, 298 Judicial District, and/or *Cecil R. Simmons, et al. v. Royal Insurance Company of America, et al.*, Cause No. 90-89-4464-A, or *Cecil R. Simmons, et al. v. Royal Insurance Company of America, et al.*, Cause No. 90-89-5106-A, civil actions currently pending in the District Court of Cameron County, Texas, 107th Judicial District, cannot and henceforth shall not:

1. Directly or indirectly take any action to relitigate against the Royal plaintiffs, or their officers, agents, servants, employees, attorneys, affiliates or privies, any issues or claims resolved by this Court in *Royal Insurance Company of America, et al. v. O-L Investments, Inc., et al.*, No. CA3-88-1069-H (N.D. Tex. 1989).

2. Directly or indirectly take any action to relitigate against the Royal plaintiffs, or their officers, agents, servants, employees, attorneys, affiliates or privies, any issues or claims resolved by this Court in this action, including those issues and claims that the Court has decided in adjudicating the affirmative defenses asserted by Quinn-L and the Investors.

3. Institute or pursue any legal proceeding that seeks to impose or that could result in the imposition of liability upon the Royal plaintiffs, or their officers, agents, servants, employees, attorneys, affiliates or privies, based on or in connection with the proceedings or judgment entered in *Mike Allen Adkisson, et al. v. Quinn-L Capital Corporation, et al.*, Cause No. 89-11030-M,

in the District Court of Dallas County, Texas, 298th Judicial District.

4. Directly or indirectly take any action whatsoever in furtherance of the prosecution of *Cecil R. Simmons, et al. v. Royal Insurance Company of America, et al.*, Cause No. 90-89-4464-A, a civil action currently pending in the District Court of Cameron County, Texas, 107th Judicial District.

5. Directly or indirectly take any action whatsoever in furtherance of the prosecution of *Cecil R. Simmons, et al. v. Royal Insurance Company of America, et al.*, Cause No. 90-89-5106-A, a civil action currently pending in the District Court of Cameron County, Texas, 107th Judicial District.

SO ORDERED this 1st day of July, 1992.

/s/ Barefoot Sanders
HON. BAREFOOT SANDERS,
CHIEF JUDGE
NORTHERN DISTRICT
OF TEXAS

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ROYAL INSURANCE COMPANY OF AMERICA AND ROYAL LLOYDS OF TEXAS,	)	Civil Action No. 3:90-CV-0550-H
Plaintiffs,	)	
v.	)	
QUINN-L CAPITAL CORPORATION, et al.,	)	
Defendants.	)	

FINAL DECLARATORY JUDGMENT

(Filed July 1, 1992)

In this action, plaintiffs Royal Insurance Company of America and Royal Lloyds of Texas seek to enforce a declaratory judgment entered by this Court on September 8, 1989. Plaintiffs moved for summary judgment pursuant to Rules 56 and 57 of the Federal Rules of Civil Procedure and 28 U.S.C. §§ 2201-2202. On December 20, 1991, the Court entered its Memorandum Opinion and Order (1) concluding that there is no genuine issue of material fact and that plaintiffs are entitled to judgment as a matter of law and (2) granting plaintiffs' motion for summary judgment.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED as follows:

1. Any claim that Royal[1] is liable to Quinn-L or the Investors for all or any portion of the default judgment entered in Cause No. 89-11030-M in the District Court of Dallas County, Texas, 298th Judicial District, entitled *Mike Allen Adkisson, et al. v. Quinn-L Capital Corporation, et al.* (the "*Adkisson* action"), is barred by the Court's September 8, 1989 Final Judgment in No. CA3-88-1069-H, entitled *Royal Insurance Company of America v. O-L Investments, Inc., et al.* (the "Final Judgment").

a. The Final Judgment conclusively determined that Royal owed no duty to defend or to indemnify Quinn-L for any claims of property damage or personal injury, including mental anguish, arising from the claims of approximately 157 investors against Quinn-L in the federal actions before this Court in cause numbers 3-87-1384-H, 3-87-1589-H, 3-87-1873-H, 3-87-2113-H through 3-87-2133-H, 3-87-3068-H and 3-88-1153-H (the "Federal Liability Actions").

b. The Final Judgment conclusively determined Royal's obligations to Quinn-L under all insurance policies issued to Quinn-L by Royal or any of its affiliated companies.

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[1] For purposes of this Judgment, plaintiffs Royal Insurance Company of America and Royal Lloyds of Texas, together with their affiliated companies, will be referred to collectively as "Royal"; defendants Quinn-L Capital Corporation, Quinn-L Financial Corporation, Quinn-L Equities, Inc., Quinn-L Management Corporation and Quinn-L Mortgage Company will be referred to collectively as "Quinn-L"; and the remaining defendants who have appeared in this litigation will be referred to collectively as "the Investors".

c. Whether Royal owed a duty to defend or to indemnify Quinn-L for any claims of property damage or personal injury including mental anguish, arising from the claims asserted in the Federal Liability Actions was fully and fairly litigated in CA3-88-1069-H, and the Court's determination that Royal owed no such duty to defend or to indemnify Quinn-L under any insurance policy issued to Quinn-L by Royal or any of its affiliated companies was necessary and essential to the Final Judgment.

d. The Final Judgment covers all of the same facts, claims and issues as the *Adkisson* action.

e. The doctrines of collateral estoppel and res judicata preclude relitigation of findings in the Final Judgment that Royal had no duty to defend or to indemnify Quinn-L for any of the claims asserted by the Investors in the *Adkisson* action under any insurance policy issued to Quinn-L by Royal or any of its affiliated companies.

f. Quinn-L and the Investors are in privity and are equally bound by the Final Judgment.

g. Since the Final Judgment determined there was no coverage under any policies issued to Quinn-L by Royal or any of its affiliated companies for any claims asserted by the Investors in the *Adkisson* action, Royal's denial of an unqualified defense to Quinn-L was reasonable and therefore immune from allegations of bad faith; Quinn-L and the Investors are consequently barred by the Final Judgment from asserting or maintaining a claim for bad faith or contributory negligence against Royal based

upon or relating in any manner to the default judgment entered in the *Adkisson* action.

h. In the absence of coverage for the claims asserted by the Investors in the *Adkisson* action, the conduct of Royal or its putative agents after entry of the Final Judgment, which Quinn-L and the Investors assert as bases for their affirmative defenses of estoppel, waiver and bad faith or contributory negligence, did not create any coverage for the claims asserted in the *Adkisson* action under any policies issued to Quinn-L by Royal or any of its affiliated companies.

2. Enforcement of the Final Judgment is not barred by the affirmative defenses asserted by Quinn-L and the Investors.

a. Quinn-L's and the Investors' affirmative defenses of estoppel, waiver and bad faith or contributory negligence are before the Court.

b. The actions of Royal or its putative agent, Coyt Randal [sic] Johnston, did not cause the default judgment entered in the *Adkisson* action or any other alleged injury to Quinn-L.

c. The actions of the Investors and S. Mark Lovell caused the default judgment in the *Adkisson* action or any other alleged injury to Quinn-L.

d. Quinn-L and the Investors failed to establish any genuine issue of material fact as to whether Royal or its putative agents caused the default judgment in the *Adkisson* action or any other alleged injury to Quinn-L; Quinn-L and the Investors consequently failed to meet their

summary judgment burden as to an essential element of each of their affirmative defenses.

3. Royal has no liability to Quinn-L or the Investors based upon or relating in any manner to alleged representations regarding coverage made by the Dunn-Odom Insurance Agency.

4. Based on the Court's determinations set forth above, Royal has no liability to Quinn-L or the Investors based upon or relating in any manner to the default judgment entered in the *Adkisson* action or any other alleged injury to Quinn-L.

5. The Court retains jurisdiction of this matter to the extent necessary to enforce its judgments.

DATED: July 1st, 1992.

/s/ Barefoot Sanders,
HON. BAREFOOT SANDERS,
CHIEF JUDGE
NORTHERN DISTRICT
OF TEXAS

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ROYAL INSURANCE COMPANY OF AMERICA and ROYAL LLOYDS OF TEXAS, Plaintiffs	*	Civil Action No. 3-90-0550-H
v.	*	
QUINN-L CAPITAL CORPORATION, QUINN-L EQUITIES, INC., QUINN-L FINANCIAL CORPORATION, and QUINN-L MORTGAGE COMPANY, Defendants	*	

MEMORANDUM OPINION AND ORDER

(Filed Nov. 30, 1990)

Before the Court are Plaintiffs Royal Insurance Company of Texas and Royal Lloyds of Texas' (collectively "Royal") Application for Injunctive Relief, filed October 30, 1990; and Defendants Quinn-L Capital Corporation, Quinn-L Equities, Inc., Quinn-L Financial Corporation, Quinn-L Management Corporation, Quinn-L Mortgage Company's (collectively "Quinn-L" or "the Quinn-L Entities") and numerous Individual Investors' (collectively the Investor Plaintiffs) Opposition to Royal's application, filed October 31, 1990. In addition, the Court has before it

Proposed Findings of Fact and Conclusions of Law submitted by both Plaintiffs and Defendants, exhibits (designated "PX" and "DX" herein) and deposition transcripts admitted into evidence by the Court. Also, the Court has taken judicial notice of the proceedings in various related judicial proceedings. *See* Hearing Tr. at 13-14.

Upon Royal's Application filed October 30, 1990 the Court entered a Temporary Restraining Order ("TRO") on October 31, 1990 after hearing oral argument of counsel. The TRO presently restrains Defendants from pursuing certain actions in state court in Brownsville, Texas wherein they seek to enforce against Royal a $740 million state court judgment obtained after this Court entered judgment on September 8, 1989 declaring that Royal had neither a duty to defend Quinn-L nor a duty to indemnify Quinn-L under the insurance policies at issue in these actions. The hearing on Royal's Application for Preliminary Injunction following the issuance of the TRO was extended from November 13, 1990 to November 20, 1990, a date agreed upon by the parties.

Having considered the pleadings and evidence on file as well as the oral argument of counsel at the November 20, 1990 hearing, the Court **GRANTS** Royal's Application for a Preliminary Injunction. The following constitute the Court's findings of fact and conclusions of law. Because "[t]he four prerequisites for preliminary injunctive relief are mixed questions of fact and law," *Apple Barrel Productions, Inc. v. Beard*, 730 F.2d 384, 386 (5th Cir. 1984), any factual finding which is actually a legal conclusion should be deemed to be and treated as such, and any legal conclusion which is really a factual finding should be deemed to be and treated as such.

I. Findings of Fact.

A. The Federal Liability Action and the First Federal Declaratory Action.

In May of 1987, 26 lawsuits were brought in this Court by some 157 investors (the "Investor Plaintiffs" or simply "Investors") who allegedly lost money they had invested in various syndicated real estate investments offered or managed by one or more of the Defendant Quinn-L Entities. Mr. S. Mark Lovell is the sole shareholder of all of the Quinn-L Entities, save Quinn-L Capital Corporation. Lovell is the sole owner of all of the voting stock of Quinn-L Capital Corporation and is the beneficial owner of all of its assets.[1] *See* PX 3 at ¶ 2; PX 4 at 3-11. The 26 lawsuits brought by the Plaintiff-Investors against Quinn-L and Lovell were consolidated by the Court into one case, Civil Action No. 3-87-1384-H.[2] The

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[1] Lovell filed for personal bankruptcy in March, 1987 and turned over all of his Quinn-L stock to the trustee of the bankruptcy estate. In January, 1989 the bankruptcy court returned the valueless stock to Lovell. At least since the start of Lovell's bankruptcy, Quinn-L has had no officers, directors, or significant assets, and since January, 1989 Lovell has had sole authority to act for Quinn-L. *See* PX 5 at 131, 146, 146-47; 6 at 12, 14, 27-28; 7; 8 at 162-68; 58 at ¶¶ 7, 50.

[2] The individual lawsuits consolidated in CA3-87-1384-H were: 3-87-2384-H, 3-87-1589-H, 3-87-1873-H, 3-87-2113-H, 3-87-2114-H, 3-87-2115-H, 3-87-2116-H, 3-87-2117-H, 3-87-2118-H, 3-87-2119-H, 3-87-2120-H, 3-87-2121-H, 3-87-2122-H, 3-87-2123-H, 3-87-2124-H, 3-87-2125-H, 3-87-2126-H, 3-87-2127-H, 3-87-2128-H, 3-87-2129-H, 3-87-2130-H, 3-87-2131-H, 3-87-2132-H, 3-87-2133-H, 3-87-3068-H, and 3-88-1153-H (collectively the "Federal Liability Suits").

Federal Liability Suits alleged, *inter alia*, RICO and federal securities claims, as well as state-law causes of action of negligence, fraud, constructive fraud, breach of contract, breach of fiduciary duties, civil conspiracy, negligent misrepresentation, violations of the Texas Securities Act and the Texas Deceptive Trade Practices Act, exemplary damages, and attorneys' fees. All of these claims were based on a common nucleus of operative facts – that is, the Plaintiff-Investors claimed that they sustained damages due to the loss of their investments because of the conduct of Quinn-L. *See* PX 9.

Subsequently, the Quinn-L Entities, through the Dunn-Odom Insurance Agency, Inc., requested that Royal defend them in the Federal Liability Suits, which Royal agreed to do subject to a reservation of rights.[3] Quinn-L accepted this qualified defense by Royal. *See* PX 12-15. On May 10, 1988, Royal filed a declaratory judgment action in this Court. *See Royal Insurance Company of America v.*

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[3] Royal stated, *inter alia*, that

> it is our contention . . . that no coverage under the policies at issue is provided for the claims alleged in the complaints. Therefore, we intend to institute a declaratory judgment action. . . .
>
> . . . Royal . . . will provide such a defense only on the condition that its acts or actions in doing so will not prejudice any rights or defenses it currently has, has had in the past, or may have in the future, under the policies at issue. . . . Royal specifically reserves the right to go forward with the prosecution of a declaratory judgment action . . . seeking a declaration that there is no coverage afforded under the policies at issue. . . .

PX 13 at 6-7.

Q-L Investments, Inc., No. CA3-88-1069-H (the "Federal Declaratory Judgment Action"). In this federal action, Royal sought a declaration that it owed no duty to defend and no duty to indemnify the Quinn-L Entities for any claims brought in the Federal Liability Suits. *See* PX 16 at ¶ 30.

On June 6, 1988 the Plaintiff-Investors moved to intervene in the Federal Declaratory Judgment Action "in order that they might be provided a fair opportunity to protect their bona fide interests, which have thus far been trampled upon by all involved parties." DX 12 at 9; PX 19 at 9. The Plaintiff-Investors sought to intervene in order to move to dismiss the Federal Declaratory Judgment Action for lack of justiciability.[4] *See* DX 12 at Ex. C; PX 19 at Ex. C. The Court denied the Plaintiff-Investors' Motion to Intervene, finding that they failed to meet the requirements for intervention as a matter of right pursuant to Federal Rule of Civil Procedure 24.[5]

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[4] Quinn-L also moved to dismiss the First Declaratory Judgment Action on the ground of lack of justiciability. *See* PX 17. The Court denied that motion by its Memorandum Opinion and Order filed August 19, 1988, in which it found that "the parties' positions are concrete and adversarial" and that the dispute over the insurance policies' coverage was independent of the Federal Liability Action. Memorandum Opinion and Order entered August 19, 1988, at 3; *see id.* at 3-4.

[5] Rule 24 reads in pertinent part:

> Upon timely application anyone shall be permitted to intervene in an action . . . when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's

The Quinn-L Entities filed three documents in the Federal Declaratory Judgment Action on February 10, 1989. First, Quinn-L filed its Answer. The Quinn-L Answer asserted fifteen affirmative defenses, including that Royal was estopped to deny defense and indemnification obligations because of "acts and courses of conduct of [Royal] agents, representative, and employees." PX 22 at 6.

The second document Quinn-L filed on February 10, 1989 was a counterclaim against Royal seeking declarations of duties to defend and to indemnify under seventy-four insurance policies alleged to be issued by Royal and other companies, and not just under the general comprehensive business policy and umbrella policy under which the Quinn-L Entities originally had requested a defense. *See* PX 21 at Ex. A. The counterclaim sought a declaration that these numerous policies "provide coverage and/or indemnity for any losses incurred by [Quinn-L] arising

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ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Fed. R. Civ. P. 24(a). The Court, noting that "[t]he real party in interest is the party possessing the right sought to be enforced, which is not always the party who will ultimately benefit from the recovery," PX 20 at 3, found that the Investor Plaintiffs were not real parties in interest to the lawsuit. *See id.* at 3-4. The Court further found that "any interest which the investors might have in the subject matter of the declaratory judgment is adequately represented by the existing Defendants." *Id.* at 4. The Court also noted that insofar as the Investor Plaintiffs sought to raise the same issue of dismissal for lack of a justiciable controversy as was addressed by the Court's Memorandum Opinion and Order entered August 19, 1988 denying Quinn-L's identical motion, the Court's conclusion that Quinn-L adequately represented the Investor Plaintiffs was reinforced.

from the claims asserted" in the Federal Liability Suits. PX 21 ¶ 3, at 2. Furthermore, Quinn-L alleged in the counterclaim that the Federal Liability Suits "state causes of action alleging an occurrence resulting in property damage, bodily injury, or other liability within the coverage provided by one or more of the policies" and that these occurrences "are not excluded by the limitations, exclusions, conditions, endorsements, riders, or forms made a part of the policies, or any one of them." *Id.* ¶¶ 6, 7, at 3.

The third document Quinn-L filed on February 10, 1989 was their Response to Royal's Motion for Summary Judgment, which had been filed on December 12, 1988. In Part III of their Response, entitled "Plaintiffs As A Matter Of Law Have A Duty To Defend Defendants On The Allegations In The Underlying Complaints," the Quinn-L Entities stated the following:

> Under Texas [l]aw, the duty to defend is determined solely from the face of the pleadings and it arises if one or more of the underlying claims, *taken as true*, are sufficient to state a cause of action coming within the terms of the policy. *Rhodes v. Chicago Insurance Co., A Division of Interstate National Corporation*, 719 F.2d 116, 119 (5th Cir. 1983). . . . In applying the "pleadings only" rule the Court should indulge in the most liberal interpretation of the allegations with doubts as to the import of the allegations resolved in favor of the insured and coverage. . . . Even when the complaint pleads in the alternative or alleges more than one cause of action, the insurer is obligated to defend, as long as the complaint alleges "at least one cause

of action" within the coverage of the policy." *Rhodes, supra* at 119.

It is clear from a reading of the allegations contained in the pending consolidated suits [the Federal Liability Suits] that Defendants are not only owed a duty to defend by Royal, but are *within the terms of coverage* under the policies. . . .

Policy PLA 172833 is denominated as a "Comprehensive Catastrophe Liability Policy" (Big Shield Policy), with a $5,000,000 occurrence policy limit. . . . Big Shield Policy also includes liability for all professional liability unless limited by the amounts stated in the declarations, or exclusions. . . . The coverage under the Big Shield Policy as stated above covers personal injury which includes [ ] mental injury, mental anguish, malicious prosecution, humiliation, also invasion of rights of privacy, liable [sic], slander, or defamation of character.

. . . .

. . . Moreover, in the Quinn-L litigation [the Federal Liability Suits], the Plaintiffs seek not only damages for loss of investment and future profits; but also personal injury, property damage, and advertising liability in addition to:

. . . .

(3) treble damages, as consumers of services for defendants' unlawful acts and conduct for violations of the Deceptive Trade Practices Act. Tex. Bus. & Com. Code § 17.41 *et seq.* . . .

PX 24 at 5-9 (footnotes omitted). The Quinn-L Entities further argued in their Rejoinder, filed March 14, 1989, that claims for mental anguish were both included in the

Federal Liability Suits and were covered by the policies at issue in the Federal Liability Suits. In Section D of that Rejoinder, Quinn-L states:

> 1. *Mental Anguish* . . . . Amongst the allegations and claims in the *Akin* and *Barrett* actions are claims for negligence, negligent misrepresentation, wreckless [sic] representation, Deceptive Trade Practice Act violations, and various [other claims]. . . .
>
> . . . Mental anguish has specifically been held to be an injury for which damages may be recovered under the Deceptive Trade Practices Act. *See [ ] Miller v. Dick[en]son*, 677 S.W.2d 253 (Tex. App. – F[ort] Worth 1984, writ refused n.r.e.). In *Miller*, despite absence of physical injury, damages for mental anguish were awarded under the DTPA. . . . Likewise, in *St. Elizabeth Hospital v. Garrard*, the Supreme Court [of Texas] held proof of physical injury is no longer required in order to recover for negligent infliction of mental anguish. 730 S.W.2d 649 (Tex. 1987).
>
> It is not only well settled that mental anguish, which is covered by the relevant policies herein, is included amongst the component elements of a Deceptive Trade Practices Act claim, it is also included amongst the component elements of the Plaintiffs' wreckless [sic] misrepresentation claims in the *Akin* and *Barrett* actions.

PX 25 at 5-6.

The parties having fully litigated all of these issues, as well as others, the Court entered its Memorandum Opinion and Order on April 14, 1989 granting Royal's

Motion for Partial Summary Judgment. After quoting the pertinent policy provisions, the Court held as follows:

> The plaintiff-investors in the Quinn-L cases allege claims for relief arising from the offering of investments in syndicated partnerships established by one or more entities within the Quinn-L Group and the operation of the partnerships. Complaints include Securities claims, RICO claims, DTPA claims, fraud and others.
>
> The Court finds that the language of the insurance coverage is unambiguous, taken alone or in consideration of the Quinn-L cases. *See Westwind Exploration, Inc. v. Homestate Sav. Ass'n.*, 696 S.W.2d 378, 381 (Tex. 1985) (If there is no ambiguity in an instrument, its construction is a matter of law for the Court.) As a matter of law, the allegations in the pending suits do not state claims within coverage. Although the investors allege loss of their investments, they allege no injury to tangible property which could constitute an "occurrence." Additionally, none of the losses constitutes "property damage" as required by the policy.

Memorandum Opinion and Order entered April 14, 1989 at 2-3 (footnote omitted). The Court further held that "[n]either have Defendants shown that personal injuries (in the form of mental anguish) were caused by an 'occurrence.' " *Id.* at 3 n.3.

The Court actually entered Summary Judgment against all Defendants except those in bankruptcy on April 27, 1989. *See* PX 27. In entering the Partial Summary Judgment, the Court noted that it was based on consideration of all of the issues raised and litigated by Royal's

Motion, Quinn-L's Response, Royal's Reply, and Quinn-L's Rejoinder.

> The Court, having reviewed and considered the arguments of counsel and the authorities cited in support thereof, is of the opinion and finds that there is no genuine issue of material fact and [Royal's] Motion for Partial Summary Judgment should be granted. The Court finds that the language of the policies [at issue in the lawsuit] is unambiguous.

PX 27 at 1. The Court then recited all of the cause numbers of the suits then pending as the consolidated Federal Liability Suits, defined them for the purpose of convenience as the "pending suits," and stated that it "finds, as a matter of law, that the allegations in those suits do not state a claim within the coverage provided by the policies." *Id.* at 2. Accordingly, the Court found that Royal had no duty to defend Quinn-L and likewise had no duty to indemnify Quinn-L for any of the claims raised by the Federal Liability Suits. *See Id.* Thus, the Court formally entered judgment against the Quinn-L Entities.[6]

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[6] As will be discussed more fully in the Court's Conclusions of Law, *infra*, a partial summary judgment that is final and appealable pursuant to Federal Rule of Civil Procedure 54(b) is a judgment that the Court may protect or effectuate by injunction. *See Donelon v. New Orleans Terminal Co.*, 474 F.2d 1108, 1113-14 (5th Cir.), *cert. denied*, 414 U.S. 855 (1973); *see also* 17 C. Wright & A. Miller, *Federal Practice and Procedure: Jurisdiction 2d* § 4226 at 550 (1988) (stating that a federal court may issue an injunction to protect or effectuate "a partial summary judgment that has been made final and appealable").

The Investor Plaintiffs contend that it was not until the Dallas State Action that they "pleaded claims for mental anguish and mental injuries as damages for negligent and or

Following the April 14, 1990 Order and the April 27, 1990 Judgment, Quinn-L submitted its Report Identifying the Issues Remaining to be Litigated, filed May 4, 1989. Quinn-L told the Court in that Report that

> it is the Defendants' position that excluding the issues of entitlement to and amount of reasonable attorneys['] fees, there are no remaining issues to be litigated in this case, either under Petitioner's Second Amended Petition For Declaratory Judgment or Defendants' Original Counterclaim.

PX 28 at 1-2.

On July 28, 1989, Royal and the Quinn-L Defendants submitted a stipulation of facts to the Court concerning certain insurance policies purportedly issued by Royal to Quinn-L. By that stipulation, the parties acknowledged that many policies not specifically enumerated in the Court's Summary Judgment fell within the scope of the Court's ruling. *See* PX 29.

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grossly negligent acts of the Quinn-L Entities." Defendants' Proposed Finding of Fact 17, at 7. In addition, the Investor Plaintiffs seem to place great stock in their contention that Royal also believed that mental anguish and mental injury were not issues before the Court in the Federal Actions. *See e.g., id.* at 23, at 10 (quoting DX 43); *id.* 26, at 11 (quoting DX 9); *id.* 27, at 11-12 (quoting DX 10).

What matters, of course, is not what the parties thought, but what they actually presented to the Court for determination and what the Court actually decided. The record clearly shows that the issue of mental anguish was fully litigated in the Federal Declaratory Judgment Action and was necessary to the Final Judgment entered in that case.

Finally, on September 8, 1989 the Court entered a separate final judgment that consolidated the terms of the April 27, 1989 Summary Judgment, the May 4, 1989 Quinn-L Report, and the July 28, 1989 Stipulation entered into between Quinn-L and Royal. This Final Judgment, like the Summary Judgment, recited all of the cause numbers of the Federal Liability Suits and for the purpose of convenience referred to them as the "pending suits."[7] The Court again held that Royal had neither a duty to defend nor a duty to indemnify Quinn-L for any of the claims brought in the Federal Liability Suits. The Judgment did not purport to dispose of any of the claims brought in the Federal Liability Suits, but rather was a final, appealable Judgment in favor of Royal on all of the issues litigated in the Federal Declaratory Judgment Action. *See* Fed. R. Civ. P. 54(b). All of the Defendants in the present action were Defendants in the Federal Declaratory Judgment Action, *compare* PX 1 *with* PX 30, and that Judgment never was appealed.

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[7] At the time the Final Judgment was entered, however, the Federal Liability Suits had been dismissed by the Court's Order signed August 28, 1989. *See* DX 30; PX 56. That Order granted the Federal Liability Plaintiffs' Conditional Motion to Dismiss, filed August 3, 1989. *See* PX 55. The Investor Plaintiffs' Motion represented that "Plaintiffs and these Quinn-L Defendants have reached an agreement in principle for settlement of plaintiffs' claims" and requested the dismissal in order to "further streamline the litigation pending in this Honorable Court." PX 55 at 2. Despite this representation to the Court, the Investor Plaintiffs state that "the claims were dismissed with the clear intention that the state claims would be refiled in the state district court." Samuel Boyd Deposition, vol. II at 132.

B. The Dallas State Action.

As already noted, *see supra* note 7, the Court dismissed the Federal Liability Suits by its Order signed August 28, 1989. In that Order, the Court dismissed the Plaintiffs' federal claims with prejudice and dismissed without prejudice Plaintiffs' remaining state law claims pursuant to the rules established by *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966). Approximately two weeks later, on September 14, 1989, the Investor Plaintiffs filed a lawsuit against the Quinn-L Entities in the 298th Judicial District Court of Dallas County, Texas, styled *Adkisson v. Quinn-L Capital Corporation*, Cause No. 89-11030-M ("Dallas State Action"). DX 18; PX 58. Like the Federal Liability Suits, the Dallas State Action alleged fraud, constructive fraud, negligence, breach of contract, breach of fiduciary duties, civil conspiracy, negligent misrepresentation, violations of the Texas Securities Act and Texas Deceptive Trade Practices Act, exemplary damages and attorneys' fees. The Dallas State Action was based on the same transactions as were the earlier Federal Liability Actions. *Compare* PX 9 *with* PX 58. In fact, the Plaintiffs explicitly stated that the state-law claims brought in the Dallas State Action were the same state-law claims originally brought in the Federal Liability Suits.

> 9. Plaintiffs originally brought suit against the Defendants named herein and various other parties that were involved in the Quinn-L Group offerings in the United States District Court for the Northern District of Texas, Dallas Division, in a series of actions, filed between May 30, 1987, and March 18, 1988. These actoins were premised on violations of various federal statutes, as well as the pendent state claims asserted

> herein. Plaintiffs pursued this litigation in federal court until August 29, 1989, at which time the the [sic] District Court entered its Memorandum Opinion and Order dismissing the *federal* causes of action against the Quinn-L Defendants. The Court further, pursuant to the doctrine in *United Mine Workers v. Gibbs*, dismissed, without prejudice, all remaining pendent state claims against the Quinn-L Group.
>
> 10. Pursuant to Section 16.064 of the Texas Civil Practice and Remedies Code, Plaintiffs have filed this Original Petition, premised on the state law causes of action that have been dismissed, in federal court, without prejudice, within sixty (60) days of dismissal. . . . Plaintiffs therefore are entitled to and do now hereby assert their state law claims in this forum.

DX 18 ¶¶ 9, 10, at 7-8; PX 58 ¶¶ 9, 10, at 7-8; *see* DX 19 ¶¶ 9, 10, at 3-4 (repeating quoted assertions in Plaintiffs' First Amended Original Petition, filed May 4, 1990).

In October of 1989, Lovell, on behalf of the Quinn-L Defendants, directed his personal attorney, J. Broocks Greer, III, to request a defense of the Dallas State Action from Royal. *See* PX 5 at 145 (Deposition of Lovell). Greer asked for the defense by letter dated October 5, 1989. *See* PX 60; PX 59 at 116 (Deposition of Greer). Royal responded to the request for a defense by letter dated November 14, 1989, wherein Royal offered a defense subject to a reservation of rights. *See* PX 61. Royal retained an attorney, Coyt Randall Johnston, to represent the Quinn-L Defendants pending a response to its offer of a defense subject to a reservation of rights. *See* PX 62, 63. At the time an answer was due in the Dallas State Action,

Quinn-L had made no effort to obtain independent counsel to enter an appearance,[8] and Johnston filed a general denial to Plaintiffs' petition in the Dallas State Action on November 17, 1989. Although Lovell, on behalf of Quinn-

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[8] Quinn-L's failure to obtain independent counsel was clearly not due to ignorance of the law or of the consequences of not answering in the Dallas State Action, as the following excerpt from a deposition of S. Mark Lovell shows:

> Q. Now, [Mr. Lovell,] you're a lawyer, and you know that if nobody answers a lawsuit, defaults can be entered against the defendant, don't you?
>
> A. I generally know that, yes.
>
> Q. Had you made any arrangements to have an attorney or yourself just file an answer in that lawsuit to prevent default against the Quinn-L Companies?
>
> A. I did not. I couldn't afford one at that point.
>
> . . . .
>
> Q. Did you have any attorneys that represented you personally at that time?
>
> A. Yes, Rick Adkinson and Broocks Greer.
>
> Q. Were you paying them?
>
> A. I was not.
>
> Q. And, in fact, Mr. Greer had been acting as attorney on behalf of Quinn-L by writing letters on their behalf, hadn't he?
>
> A. He had.
>
> Q. And you had been giving him instructions to act on behalf of Quinn-L.
>
> A. That is correct.
>
> Q. But your testimony is you made no arrangements to answer a multi-million dollar lawsuit based on false allegations that were filed against your corporations?
>
> A. Both of those attorneys [Adkinson and Greer] . . . told me they could not undertake . . . on credit, a task of de[f]ending this type of thing. . . .

PX 8 at 209, 210-11 (Deposition of Lovell).

L, denies ever having authorized Johnston to appear in the Dallas State Action, Lovell has admitted that he, too, would have denied the Plaintiffs' allegations. *See* PX 8 at 209. Indeed, Lovell expressed to Johnston his appreciation for Johnston's efforts in the litigation. *See* PX 86.

Almost two months later, by letter dated January 9, 1990, Quinn-L rejected Royal's offer of a defense subject to reservation of rights and stated that "[t]he [Quinn-L] companies will accept a defense only if coverage is acknowledged." PX 67. The evidence conclusively establishes that Lovell, on behalf of the Quinn-L Entities, refused Royal's offer of a defense subject to a reservation of rights at the urging of the Investor Plaintiffs, *see* PX 59 at 117-19, and because of a Compromise and Settlement Agreement entered into by the Investor Plaintiffs, on the one hand, and Lovell, his wife, and Ogden Sutro (all of whom were individual Defendants in the Federal Liability Suits), on the other.[9] This Agreement was signed on April 5, 1989 – while the Federal Liability Suits and the

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[9] Lovell stated in a deposition taken on October 18, 1990:

> . . . There was certainly an offer of some type of a defense offered me by Royal or to the companies. I had gone through a similar situation like that with Royal on other situations. And for two reasons, one, my own and, two for the purposes as part of my settlement agreement with the plaintiffs, I advised to keep them informed.
>
> I refused to accept a settlement or a defense unless there was a full defense. Coverage, I guess, is what it is. I would still maintain that because of those two things that I just mentioned.

PX 8 at 35 (Deposition of Lovell).

Federal Declaratory Judgment Action were pending.[10] The sole purpose of the Agreement was to pursue Royal. *See* PX 42 at 1-2 (letter from Investor Plaintiffs' Counsel stating that "the whole point of the Compromise and Settlement Agreement was for Plaintiffs to be able to pursue Royal Insurance Company").

Thereafter, Royal instructed Johnston to take no further action in the Dallas State Action, *see* PX 63, 69, and informed Greer that Quinn-L would have to replace Johnston and that Johnston would withdraw from the case. *See* PX 71-74. Johnston informed Greer and Lovell of his intention to withdraw from the case, informed them of the process of withdrawal and the likely consequences of their failing to obtain substitute counsel, and closed by stating that "[i]f I have not received some direction from you by April 30, . . . it will be necessary for me to move to withdraw even in the absence of replacement counsel." PX 75 at 2. Neither Lovell nor Quinn-L took any steps to

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[10] The Compromise and Settlement Agreement provided, *inter alia*, that the Investor Plaintiffs would not execute against Lovell on any of the claims in their lawsuits; that all claims Lovell might have against any insurer, including Royal, arising from the lawsuits was assigned to the Investor Plaintiffs; that Lovell was obligated to cooperate with the Investor Plaintiffs in the litigation; and that the Investor Plaintiffs were obligated to withdraw their previously filed objections to Lovell's discharge in bankruptcy. *See* PX 31 (Compromise and Settlement Agreement).

In addition, the evidence demonstrates that although the Compromise and Settlement Agreement between the Investors and Lovell was not signed until April 5, 1989, settlement negotiations between the Investors' counsel and Lovell started as early as June, 1988 and resulted in a letter agreement by October 11, 1988. *See* PX 33-35.

replace Johnston, *see* PX 3 ¶¶ 29, 30, at 7 and Johnston moved to withdraw on May 16, 1990. *See* PX 79.

On May 21, 1990, while Johnston's Motion to Withdraw was pending, the Investor Plaintiffs served 120 Requests for Admissions directed to each of the five Quinn-L Defendants. *See* PX 80, 70 at 125. Johnston answered the Requests, denying "a very large percentage of them." PX 70 at 127 (Deposition of Johnston). Lovell has testified that he, too, would have denied the requests for admissions. PX 5 at 81-101 (Deposition of Lovell). On May 30, 1990 the Dallas State court granted Johnston's Motion to Withdraw and directed all further notice and correspondence with Defendants regarding the lawsuit to be sent to Lovell or Greer. *See* PX 81. Neither Lovell nor any representative of Quinn-L did anything to obtain counsel after Johnston withdrew, and Lovell's only response to Johnston's repeated attempts to communicate with him was a letter dated June 13, 1990, that read as follows.

> I have received your letters of June 1 and June 7. I am sorry to be a little late responding since I have been traveling. The companies that are the subject of this litigation have been through bankruptcy or else were part of my personal estate, which has been through a bankruptcy. Several months ago I entered into a settlement with the plaintiffs represented by Sam Boyd. I am no longer an officer or director nor am I supposed to be an agent of service for any of these companies. While I continue to receive mail such as I have received from you, I have been advised by counsel I have no responsibility in their opinion. Certainly that conclusion was

> the intent of my settlement. However, not wanting to appear unconcerned about the plight of this situation, I am making this response and this information available to you in case you are not aware of such. I appreciate very much your efforts in this regard.

PX 86.

On June 27, 1990 the Investor Plaintiffs moved to strike the denials of the requests for admissions submitted by Johnston on behalf of Quinn-L for the reason that the denials were prepared without the client being consulted. Although Lovell was aware of the motion to strike the denials, *see* PX 3 at 9 (Lovell Affidavit), he did nothing to oppose the motion.[11] Accordingly, the unopposed motion to deem the denied requests for admissions "admitted" was granted by a visiting judge on July 6, 1990. *See* PX 89.

The Dallas State Action was called for trial on August 7, 1990. Although Lovell was aware of the trial date, *see* PX 83, 84, he did not enter an appearance or retain counsel to appear on behalf of the Quinn-L Defendants. *See* PX 90 at 1 (Dallas Judgment). Accordingly, based on "the evidence presented by Plaintiffs consisting of 120 admitted facts and the cumulative evidence of expert witnesses as to the calculation of damages," the Court entered a default judgment[12] against the Quinn-L entities

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[11] By the terms of the April 5, 1989 Agreement Lovell was obligated to cooperate with the Investor Plaintiffs.

[12] The Court notes that the Investor Plaintiffs, in both the TRO hearing and the Preliminary Injunction hearing, have insisted that the judgment in the Dallas State Action was not a

for more than $740 million. *See* PX 90. The Court assessed damages against the Defendants for lost investment, bodily injury ("including mental pain, suffering and

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default judgment. Investor Plaintiffs' counsel has insisted that "it was not a default judgment. . . . [T]he judge did not enter judgment because the other side didn't show up. That is what is thought of as a default judgment." DX 17 at 29 (Transcript of TRO Hearing, Statement of Samuel Boyd). Of course, the Investor Plaintiffs do admit that no one appeared for Defendants at the Dallas trial. "It was a trial. They didn't show up but what if they had shown?" *Id.* at 29.

Such contentions notwithstanding, the Dallas Judgment itself clearly states that Defendants did not appear "by counsel or otherwise." PX 90 at 1; *see also* PX 185 at 3-4 (Trial transcript of Dallas State Action). Furthermore, it is clear that the Investor-Plaintiffs knew their action would be unopposed, insofar as the judgment they submitted to the court, *see* PX 185 at 21-22 (Trial transcript of court agreeing to sign judgment presented by Plaintiffs without revision), recited the failure of Defendants to appear at the trial. Furthermore, the trial transcript clearly shows that the Investor Plaintiffs' claim that "[t]he Court, not the Plaintiff, determined the amount of exemplary damages," DX 17 at 30, is simply untrue.

In addition, the Court finds that the Investor Plaintiffs' counsel failed to inform the Dallas court of the existence of the Court's Judgments of April 27 and September 8, 1990. *See* Samuel Boyd Deposition, vol. IV at 18-19 (stating that "I didn't have any obligation to plead any other judgment, any other case" to the Dallas court and that "Judge Sanders' order had nothing to do with my case"); PX 185 *passim* (Transcript of Dallas Trial). The applicable State Bar Rule reads in pertinent part: "A lawyer shall not knowingly . . . fail to disclose to the tribunal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel. . . . " State Bar Rule 3.03(a)(4), Tex. Gov't Code Ann. ch. 82, tit. 2, subt. G, art. 10, § 9 (Vernon Supp. 1991).

anguish which has manifested itself physically"), exemplary damages, and attorneys' fees. *Id.* To state the facts bluntly but fairly, the Investor Plaintiffs bought Lovell's cooperation with their April 5, 1989 Agreement and through their collusion with Lovell obtained an enormous default judgment against Lovell's companies.

C. The Assignment and the Brownsville Actions.

On September 4, 1990 the Quinn-L Entities, through Lovell, executed an assignment of their rights and causes of action, if any, against Royal and its agents to the Investor Plaintiffs. *See* PX 4. By the terms of the Assignment, the Investor Plaintiffs agreed to pay Quinn-L ten dollars ($10) and Lovell personally five percent (5%) of any future recoveries against Royal in excess of the $740 million Dallas State Action default judgment.[13] *See id.* at 9. Lovell again agreed to cooperate with the Investor Plaintiffs, who in turn promised to pay for Quinn-L's legal representation in the present action and to reimburse Lovell for expenses incurred on the Investors' behalf. *See id.* at 9-10.

The Investor Plaintiffs who are the assignees by the terms of the Assignment are the same persons who brought the Dallas State Action, *compare* PX 4 *with* PX 58, and executed the Assignment with knowledge of the Judgment in the Federal Declaratory Judgment Action.

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[13] The Investor Plaintiffs are seeking to treble the $740 million Dallas Judgment in the Brownsville Liability Action. Lovell's cut of the potential $2.2 billion judgment would be some $74 million.

See PX 4 at 5. The Judgment in the Federal Declaratory Action was entered against the same Quinn-L Entities which executed the Assignment with the Investor Plaintiffs. *Compare* PX 4 *with* PX 30.

On the same day the Assignment was executed – September 4, 1990 – the Investor Plaintiffs filed suit in the District Court for the 107th Judicial District, Cameron County, Texas, in Cause No. 90-09-4464-A (the "Brownsville Liability Action"). *See* PX 103. In that action, the Investor Plaintiffs, "[a]s judgment creditors and assignees of the Quinn-L Entities," allege that "[t]he Quinn-L Equities' [sic] conduct . . . has caused the Plaintiffs property damage and bodily injury and, therefore, the Defendants [Royal and others] are responsible for the payment of the Judgment entered [in the Dallas State Action]." *Id.* at 14. The petition in the Brownsville Action further states that Royal wrongfully refused to defend the Dallas State Action, that Royal wrongfully denied coverage for the claims asserted in that action, and that Royal acted in bad faith in denying coverage and denying a defense without a reservation of rights. *See id.* at 15-16. In addition, the Investor Plaintiffs allege that, if in fact there is no coverage under the disputed policies, Royal either is estopped from denying coverage or waived its right to deny coverage. *See id.* at 17.

The next day, September 5, 1990, before the Royal Defendants were served in the action, the Brownsville court set a trial date for the action of December 10, 1990. *See* PX 104, 105. The Brownsville court did this in violation of its own rules, which provide that a case will be set for trial after the filing of an answer. *See* Cameron Cty.

Civ. Ct. R. 1.5(a). On October 12, 1990, the Investor Plaintiffs filed a motion for summary judgment, which was set for hearing on November 8, 1990. *See* PX 106, 107.

On September 17, 1990, the Investor Plaintiffs filed another action in the Brownsville court, seeking a declaratory judgment (the "Brownsville Declaratory Judgment Action"). *See* PX 108 (Plaintiffs' Original Petition), 109 (Plaintiffs' First Amended Original Petition). In this action, the Investor Plaintiffs seek a declaration that Royal and/or the Dunn-Odom Insurance Agency, Inc. are liable for the default judgment in the Dallas State Action.

The Brownsville Declaratory Action addresses only the four policies that were addressed by the Court in its Summary Judgment in the Federal Declaratory Judgment Action. *See* PX 108 ¶ 18 at 9, PX 109 ¶ 18 at 9. The Brownsville Liability Action, however, concerns 71 policies allegedly issued by Royal or by companies allegedly related to Royal that the Investor Plaintiffs allege may provide coverage for the claims asserted in the Dallas State Action. Of the 71 policies, 62 are included in the Court's final judgment of September 8, 1989. *See* PX 29, 30, 103 ¶ 11. Of the remaining nine policies at issue in the Brownsville Liability Action, seven of them (Nos. PYH D4-53-40, PYN 52-23-13, YAD 70-23-0, YA D7-03-39, YN 10-03-29, PYA 17-28-33, PYA D3-53-34) are actually covered by the Final Judgment of September 8, 1989 and are typographical errors, or simply are policies that do not exist. *See* Mooney Aff. ¶¶ 4-5, Pokluda Aff. The last two policies (Nos. PYA D7-02-30, PYH D4-53-48) contain insuring clause language identical to that previously litigated before and adjudicated by the Court. *See* Mooney Aff. ¶¶ 6, 7; PX 30 at ¶ 2; Pokluda Aff. Accordingly, all of

the policies or their relevant language has been litigated before this Court in the proceedings discussed above.

D. The Present Declaratory Judgment Action.

The present declaratory judgment action was filed on March 9, 1990. Royal seeks a declaratory judgment to enforce and protect the Court's prior judgment against the Quinn-L Entities. *See* PX 1 at 1 (Royal's Original Petition). Royal seeks this declaration on the ground, among others, that the issues of whether Royal had a duty to defend or to indemnify Quinn-L for claims brought in the Dallas State Action were fully litigated in the Federal Declaratory Judgment Action and decided in Royal's favor.

Quinn-L answered Royal's Complaint on August 15, 1990, *see* PX 96, and on September 4, 1990 Royal moved to amend its complaint in order to name the Investors as Defendants. *See* PX 98. This motion was granted on September 26, 1990. At the time of the hearing on Royal's Application for Preliminary Injunction on November 20, 1990, Royal had outstanding two summary judgment motions. The first of these motions is limited to the claims for loss of investment in the Dallas State Action. The second motion concerns the claims for mental anguish brought in the Dallas State Action and also asserts that the issue of whether Royal had a duty to defend or to indemnify Quinn-L against the Dallas State Action loss of investment claims has already been litigated and the subject of a final judgment.

II. Conclusions of Law.

The Court has ancillary jurisdiction to enforce and protect its prior judgment in the Federal Declaratory Judgment Action. *See Samuel C. Ennis & Co. v. Woodmar Realty Co.*, 542 F.2d 45, 48 (7th Cir. 1976) (holding that federal court has jurisdiction over nondiverse parties in action to enjoin state court proceedings where state court action could nullify prior federal judgment), *cert. denied*, 429 U.S. 1096 (1977); *see also Local Loan Co. v. Hunt*, 292 U.S. 234, 239 (1934) (holding that "a federal court of equity has jurisdiction of a bill ancillary to an original case or proceeding in the same court, whether at law or in equity, to secure or preserve the fruits and advantages of a judgment or decree rendered therein"); *Southmark Properties v. Charles House Corp.*, 742 F.2d 862, 868-69 (5th Cir. 1984) (citing *Local Loan Co. v. Hunt* in holding that district court has ancillary jurisdiction over case to protect its prior judgment from state court proceedings even where party opposing jurisdiction denies that its state proceedings would nullify prior federal judgment); *see generally* 17 C. Wright & A. Miller, *Federal Practice and Procedure: Jurisdiction 2d* § 4226 at 547-48 (1988) (stating that "[n]o independent basis of jurisdiction is required for a federal court to entertain an application to enjoin relitigation in state court. This is thought to be within the ancillary jurisdiction of the federal court").

The Court has personal jurisdiction over the Defendants that have appeared in this action, and may issue an injunction that restrains nonparties and parties who have not yet appeared or not yet been served if those persons possess sufficient minimum contacts with the State of

Texas to support the exercise of personal jurisdiction. *See generally United States v. New York Telephone Co.*, 434 U.S. 159, 174 (1977) ("The power conferred by the [All Writs] Act extends, under appropriate circumstances, to persons who, though not parties to the original action or engaged in wrongdoing, are in a position to frustrate the implementation of a court order or the proper administration of justice, . . . and encompasses even those who have not taken any affirmative action to hinder justice."); *United States v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America*, 907 F.2d 277, 281 (2d Cir. 1990) ("Injunctions may be issued against non-parties under the All Writs Act"); *In re Baldwin-United Corp. (Single Premium Deferred Annuities Insurance Litigation)*, 770 F.2d 328, 338 (2d Cir. 1985) ("An important feature of the All-Writs Act is its grant of authority to enjoin and bind non-parties"); *United States v. Hall*, 472 F.2d 261, 265 (5th Cir. 1972) (holding that "[c]ourts in equity have inherent jurisdiction to preserve their ability to render judgment"). Every person or entity subject to the injunction hereby issued has purposefully availed himself of the benefits and protections of Texas law by participating in the Dallas and Brownsville Actions and, in the case of the Quinn-L Entities, by being organized pursuant to Texas law. Accordingly, all of those subject to the injunction have the requisite minimum contacts with Texas to be bound by the injunction.

The Court has the power to issue the injunction based on the All Writs Act, 28 U.S.C. § 1651(a), which provides that "[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and

agreeable to the usages and principles of law." The power thus conferred upon the Court by the All Writs Act includes the power to issue injunctions. *See United States v. New York Telephone Co.* 434 U.S. at 172-74.

The Court's power to issue the injunction also, and independently, derives from the Declaratory Judgment Act, 28 U.S.C. § 2202, which provides that "[f]urther necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment." Royal seeks injunctive relief based on the Court's prior declaratory judgment. Accordingly, the Court is empowered to issue the injunction requested by Royal pursuant to 28 U.S.C. § 2202.

A. The Anti-Injunction Act: Provisions Authorizing Injunction.

Because the Court is hereby enjoining state court proceedings, the Court first must explain why the present injunction satisfies one or more of the exceptions to the Anti-Injunction Act. The Anti-Injunction Act expressly allows the Court to enjoin state court proceedings in certain circumstances, such as where parties seek to relitigate claims that have already been resolved by the federal court or where litigants seek to undermine the federal court's ability to resolve a case by filing a potentially crippling parallel state action. The Anti-Injunction Act reads as follows:

> A court of the United States may not grant an injunction to stay proceedings in a state court

> except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

28 U.S.C. § 2283. The Court finds that the present injunction is authorized by the "relitigation" exception and the "in aid of jurisdiction" exception to the Anti-Injunction Act.

The Fifth Circuit has stated two fundamental justifications for the relitigation exception to the Anti-Injunction Act. First, principles of federalism are enhanced when an injunction properly is issued pursuant to the relitigation exception because "nothing would be as productive of friction between the state and the federal courts as to permit a state court to interpret and perhaps to upset such a judgment of a federal court." *Jacksonville Blow Pipe Co. v. Reconstruction Finance Corp.*, 244 F.2d 394, 400 (5th Cir. 1957), (quoted in *International Ass'n of Machinists & Aerospace Workers v. Nix*, 512 F.2d 125, 130 (5th Cir. 1975)). "While § 2283 was designed to ensure the state courts' adjudicative potency, its exceptions assure that the federal courts and their judgments will not be eunuchized and that their muscularity will not be atrophied." *Donelon v. New Orleans Terminal Co.*, 474 F.2d 1108, 1114 (5th Cir. 1973). In the present action, the Investor Plaintiffs and the Quinn-L Entities are asking the state court in Brownsville to upset the final judgment entered by the Court in the Federal Declaratory Judgment Action. It is an express purpose of the relitigation exception to allow the Court to prevent such an unnecessary conflicting judgment by a state court.

Second, the Fifth Circuit "advanced an even more practical justification for this doctrine in the *Woods Exploration* case: the relitigation exception 'prevents multiple litigation of the same cause of action and it assures the winner in a federal court that he will not be deprived of the fruits of his victory by a later contrary state judgment which the Supreme Court may or may not decide to review.' " *International Ass'n of Machinists & Aerospace Workers v. Nix*, 512 F.2d 125, 130-31 (5th Cir. 1975), (quoting *Woods Exploration and Producing Co. v. Aluminum Co. of America*, 438 F.2d 1286, 1312 (5th Cir. 1971) (citing Note, *Federal Power to Enjoin State Court Proceedings*, 74 Harv. L. Rev. 726, 734 (1961)), *cert. denied*, 404 U.S. 1047 (1972)). As the Fifth Circuit stated recently, the relitigation exception is "aimed at preventing the costly and judicially wasteful determination of issue in the state court." *Quinteror v. Klaveness Ship Lines*, 914 F.2d 717, 721 (5th Cir. 1990). In the present case, the Investor Plaintiffs and the Quinn-L Entities are asking the Brownsville court not only to declare their rights under the disputed insurance policies in a manner directly contrary to this Court's prior ruling, but also to deprive Royal of its victory in this Court by enforcing (and trebling) the collusively obtained $740 million Dallas judgment.[14] *Cf. Harrelson v. United States*,

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[14] During oral argument of Royal's application for this injunction, the Investor Plaintiffs' counsel failed to deny Royal's allegation that the judgment in the Dallas State Action was collusively obtained.

> Now, they have asserted to you that the judgment that was obtained in front of Judge Canales [the Dallas Judgment] was somehow fraudulently obtained. That there was some sort of fraud on the Court. There is no fraudulent judgment or fraudulent

613 F.2d 114, 116 (5th Cir. 1980) (affirming injunction restraining "any future litigation on any cause of action arising from the fact situation at issue in this case" where claims had previously been litigated); 17 C. Wright & A. Miller, *Federal Practice and Procedure: Jurisdiction 2d* § 4226 at 552 (1988) (citing cases supporting statement that "[t]here is no difficulty in justifying an injunction against relitigation if there is a showing of bad faith, multiplicity of suits, or other evidence of harassment").

In addition, the Court finds that it is authorized to issue an injunction in this case by the "in aid of jurisdiction" exception to the Anti-Injunction Act. Although "[t]he traditional notion is that *in personam* actions in federal and state court may proceed concurrently, without interference from either court," *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 642 (1977) (plurality opinion), the Supreme Court has clearly stated that a federal court may enjoin state court litigation of claims still before the federal court as well as claims already decided by it where the injunction is "necessary to prevent a state court from so interfering with a federal court's consideration or disposition of a case as to seriously impair the court's flexibility and authority to decide [the] case." *Atlantic Coast Line R. Co. v. Brotherhood of Locomotive Engineers*, 398

> state court judgment exception to the Anti-Injunction Act. . . . If they are correct that this judgment was fraudulently obtained that is an affirmative defense to the [Brownsville] lawsuit.

Preliminary Injunction hearing transcript at 53-54 (Statement of Michael G. Terry, counsel for Investor Plaintiffs).

U.S. 281, 295 (1970); *see also Donelon v. New Orleans Terminal Co.*, 474 F.2d at 1113-14 (holding that both the relitigation exception and the in aid of jurisdiction exception to the Anti-Injunction Act applied where the court had entered a final judgment as to part of the controversy and still had before it other parts of the controversy).[15]

Similarly, it is well settled in the Fifth Circuit that the jurisdiction exception to the Anti-Injunction Act applies

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[15] Defendants' argument that the "in aid of jurisdiction" exception applies only to *in rem* proceedings is flawed. Defendants rely for this position on *Phillips v. Chas. Schreiner Bank*, 894 F.2d 127, 132 (5th Cir. 1990), in which the Fifth Circuit "reject[ed] Phillips's rather inventive argument" that Schreiner Bank "placed his encumbered properties within the jurisdiction of the district court when it represented that it would seek only judicial foreclosure on those properties." Accordingly, that case only held that such a promise to the court does not transform an *in personam* action into an *in rem* action for purpose of the Anti-Injunction Act.

Vendo Co. v. Lektro-Vend Corp., 433 U.S. 623 (1977), also cited by Defendants for the proposition that the "in aid of jurisdiction" exception applies only to *in rem* actions, is an opinion of only three Justices of the Supreme Court and consequently is not binding precedent. *See, e.g., Three J Farms, Inc. v. Plaintiffs' Steering Comm.*, 456 U.S. 936 (1982) (denying certiorari of Fifth Circuit ruling in *In re Corrugated Container Antitrust Litigation*, 659 F.2d 1332 (5th Cir. Unit A Oct. 1981) where injunction was upheld under "in aid of jurisdiction" exception and relitigation exception in an *in personam* case); *Capital Service, Inc. v. NLRB*, 347 U.S. 501 (1954) (upholding injunction of state court proceeding concerning labor dispute under the "in aid of jurisdiction" exception, thereby rejecting *in rem* requirement); *Battle v. Liberty National Life Insurance Co.*, 877 F.2d 877, 881-82 (11th Cir. 1989) (citing Fifth Circuit's analysis in *Corrugated Container* in upholding injunction in antitrust case and finding that lengthy, complicated litigation is the "equivalent of a res").

where litigants attempt to evade a federal judgment or the continuing jurisdiction of a federal court. In *In re Corrugated Container Antitrust Litigation*, 659 F.2d 1332, 1335 (5th Cir. Unit A Oct. 1981), *cert. denied sub nom. Three J Farms, Inc. v. Plaintiffs' Steering Comm.*, 456 U.S. 936 (1982), the Fifth Circuit found that the exception applied where litigants were attempting to "interfere with the [federal] court's ability to dispose of the broader action pending before it" by filing parallel state court proceedings against some of the same parties to the federal action, despite the fact that there were federal court judgments concerning only some of the controversies in the case. *See id.* In holding that "the injunction was and is not precluded by 28 U.S.C. § 2283," the court found that under circumstances of the filing of "duplicative and harassing litigation" the state court "could not be offended by losing the opportunity to entertain [a] harassing lawsuit."[16] *Id.*

In the present case, Royal comes to the Court seeking to protect and effectuate a Summary Judgment and a Final Judgment, both appealable pursuant to Federal Rule of Civil Procedure 54(b), entered in the Federal Declaratory Judgment Action. Obviously, the relitigation exception to the Anti-Injunction Act expressly allows the Court

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[16] The Fifth Circuit's opinion in the *Corrugated Container* case was cited as "persuasive" authority by the Eleventh Circuit in *Battle v. Liberty National Life Insurance Co.*, 877 F.2d at 881. In that case, the court held that "a federal court may enjoin state court plaintiffs from pursuing claims in state court that are substantially similar to claims settled by a final judgment in a federal . . . action" pursuant to both the relitigation exception and the "in aid of jurisdiction" exception to the Anti-Injunction Act.

to protect and effectuate those Judgments. Furthermore, Defendants' conduct in this case surpasses even the "duplicative and harassing" behavior which the *Corrugated Container* court found deserving of an injunction. Of course, the Investor Plaintiffs have filed duplicative and harassing state court actions directly seeking to circumvent the Court's April 27 and September 8, 1989 Judgments – Judgments they never bother to appeal – and to "eunuchize" its ability to adjudicate the present action. In addition, the Investors and Lovell – sole shareholder of all of the Quinn-L Entities – entered into a secret side agreement while the Federal Declaratory Judgment Action and the Federal Liability Suits were pending, the sole purpose of which was to pursue Royal. In furtherance of that Agreement to pursue Royal, Lovell allowed a default judgment to be entered against the Quinn-L Entities in the Dallas State Action – a $740 million judgment that, because of the September 4, 1990 Assignment, may ultimately benefit Lovell handsomely. In light of this conduct, the Brownsville court could not be offended by losing the opportunity to entertain the Investors' lawsuits.

In short, the Court finds *In re Corrugated Container Antitrust Litigation*, 659 F.2d at 1335, on all fours with the present case and therefore that the Court has authority to issue the injunction pursuant to both the relitigation exception and the in aid of jurisdiction exception to the Anti-Injunction Act.

B. Claim Preclusion and Issue Preclusion.

The relitigation exception to the general rule that federal courts shall not enjoin state court proceedings "is

founded on the well-recognized concepts of *res judicata* and collateral estoppel." *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 147 (1988). In the Fifth Circuit, the test for determining whether a claim is barred by the doctrine of res judicata – now generally called claim preclusion – is as follows:

> " 'For a prior judgment to bar an action on the basis of *res judicata*, the parties must be identical in both suits, the prior judgment must have been rendered by a court of competent jurisdiction, there must have been a final judgment on the merits and the same cause of action must be involved in both cases.' " *Nilsen v. City of Moss Point, Miss.*, 701 F.2d 556, 559 (5th Cir. 1983) (en banc), quoting *Kemp v. Birmingham News Co.*, 608 F.2d 1049, 1052 (5th Cir. 1979).

Southmark Properties v. Charles House Corp., 742 F.2d at 869.[17]

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[17] In *Kasper Wire Works, Inc. v. Leco Engineering and Machine, Inc.*, 575 F.2d 530, 536 (5th Cir. 1978), the court noted that under certain circumstances when the ground for claim preclusion is a court's prior declaration of rights, "claim preclusion may be inappropriate given the purposeful supplementary nature of declaratory relief." Unlike the situation in *Kasper Wire Works*, however, here the claim brought by Royal in the Federal Declaratory Judgment Action – concerning the duties to defend and indemnify pursuant to the policies – are subject to the doctrine of claim preclusion.

Regardless of the propriety of claim preclusion in a declaratory judgment case, the *Kaspar Wire Works* court stated that "there is no reason to permit the relitigation of any issue actually litigated and necessary to the judgment rendered in . . . an anticipatory declaratory action." *Id.* at 537.

Similarly, under the doctrine of collateral estoppel – now called issue preclusion – a party is barred from relitigating issues essential to the prior judgment that were fully and fairly litigated in the prior action. As the Fifth Circuit stated in the *Nix* case:

> This court has observed that the doctrine of collateral estoppel embodies three requirements: "(1) the issue to be concluded must be identical to that involved in the prior action; (2) in the prior action the issue must have been 'actually litigated'; and (3) the determination of the issue in the prior action must have been necessary and essential to the resulting judgment."

International Ass'n of Machinists & Aerospace Workers v. Nix, 512 F.2d at 132 (quoting *Port Arthur Towing Co. v. Owens-Illinois, Inc.*, 492 F.2d 688, 692 n.6 (5th Cir. 1974); *James Talcott, Inc. v. Allahabad Bank, Ltd.*, 444 F.2d 451, 458-59 (5th Cir. 1971)).

Although the Investor Plaintiffs were not joined in the Federal Declaratory Judgment Action, they still may be bound by the Summary Judgment and Final Judgment in that action because in the Fifth Circuit the rule is that " 'the word "parties" does not refer to formal or paper parties, but to parties in interest, that is, that persons whose interests are properly placed before the court by someone with standing to represent them are bound by the matters determined in the proceeding.' " *Southmark Properties v. Charles House Corp.*, 742 F.2d at 869 (quoting 1B *Moore's Federal Practice* ¶ 0.411[1] at 390-91).

In the present case, there is no doubt that the Investor Plaintiffs may be bound by the Court's prior judgments even though they were not formally parties to the

Federal Declaratory Judgment Action. First, the Court specifically found the Investors to be adequately represented by the Quinn-L Entities in the prior action. *See supra* note 5 (finding that "any interest which the investors might have in the subject matter of the declaratory judgment is adequately represented by the existing Defendants"); *Castro Convertible Corp. v. Castro*, 596 F.2d 123, 124-25 (5th Cir. 1979) (holding that prior determination of party's right to intervene was res judicata as to issue of whether party is bound by settlement of prior action); *Brotherhood of Locomotive Firemen and Enginemen v. Seaboard Coast Line R. R.*, 413 F.2d 19, 23-24 (5th Cir.) ("The principles of res judiciata are applicable to fully litigated issues raised by a motion to intervene"), *cert. denied*, 396 U.S. 963 (1969).

Second, the Investor Plaintiffs may be bound by the Court's prior judgments because they are in privity with Quinn-L by virtue of their control over Quinn-L and, especially, by their status as assignees of Quinn-L's rights against Royal. Indeed, Defendants admit that they are in privity with Quinn-L: "The first time we [the Investor Plaintiffs] had privity with Quinn-L was September the 4th, 1990." Hearing Tr. at 77 (Statement of Samuel L. Boyd).[18]

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[18] The Investor Plaintiffs apparently believe that because they are judgment creditors as well as assignees of Quinn-L they are not bound by prior judgments rendered against Quinn-L. *See* Hearing Tr. at 77 (statement of Samuel L. Boyd) ("Even though as judgment creditors we didn't lose rights by taking an assignment, we did not lose rights by taking an assignment, but you would not think so from Mr. Hinshaw [counsel for Royal]."). In *Davis v. Dairyland County Mutual Insurance Co.*, 582

Defendants contend that the September 8, 1989 Judgment declared nothing, and hence that neither claim preclusion nor issue preclusion is applicable to the present case. Defendants argue that because the Federal Liability Suits were dismissed prior to the entry of the Judgment in the Federal Declaratory Judgment Action, that Judgment ended a moot case and therefore was a nullity. *See* Defendants' Errata Trial Br. at 14-15.

Defendants' formalistic interpretation of the controversy requirements of the Declaratory Judgment Act and Article III conveniently ignores the applicable case law, making their mootness contention devoid of merit. The United States Supreme Court has held that "[t]he test for mootness . . . is a stringent one," and that "[m]ere voluntary cessation" of the conduct constituting a controversy does not moot a case. *United States v. Concentrated Phosphate Export Ass'n, Inc.*, 393 U.S. 199, 203 (1968). The Court's authority to grant declaratory relief pursuant to the Declaratory Judgment Act extends to the Article III limits on the Court's authority to adjudicate disputes. *See Aetna Life Insurance Co. v. Haworth*, 300 U.S. 227, 239-40 (1937). "A justiciable controversy is distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot. . . . The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests." *Id.* at 240-41.

S.W.2d 591, 593 (Tex. Civ. App. – Dallas 1979, writ ref'd n.r.e.), however, the court held that a judgment creditor who is also an assignee of the insured "can stand in no better position than [the assignor]."

Although "[t]he difference between an abstract question and a 'controversy' contemplated by the Declaratory Judgment Act is necessarily one of degree," *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941), in the present case there is no question that a controversy existed between the parties on September 8, 1989. That Defendants would assert otherwise is simply astounding, given the fact that only days later they filed the Dallas State Action and the fact that they claim that the sole reason for seeking dismissal of the Federal Liability Suits was to file the Dallas State Action. *See* Samuel Boyd Deposition, vol. II, at 132 (stating that the Federal Liability Suits' "claims were dismissed with the clear intention that the state claims would be refiled in the state district court"). The dispute between Royal and Quinn-L as to the coverage of the insurance policies was real and concrete, and remains real and concrete to this day – in this Court and in the Brownsville court. The factors determining the duties of Royal under the policies are independent of the underlying claims and were presented to the Court by parties with adverse interests.

Furthermore, the Court cannot permit Defendants to collaterally attack a final judgment entered against them that they did not even bother to appeal. Defendants raised no question as to the "regularity of the court's aciton" on appeal; accordingly, they are "not the less bound by the decree because they failed to raise [such an issue]." *Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371, 375 (1940).

The final issue regarding claim preclusion and issue preclusion is determining just which claims and issues

were finally determined by the September 8, 1989 Judgment.[19] The claims resolved by the Federal Declaratory

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[19] In this regard, the Court notes that traditionally claim preclusion has been held to be state litigation on a part of the claim that could have been heard in the federal action, but was not raised there. Likewise, the doctrine of claim preclusion has been understood to bar state proceedings on a state law claim that, pursuant to the doctrine of pendent jurisdiction, could have been joined with a claim under federal law in the federal action. *See generally* 17 C. Wright & A. Miller, *Federal Practice and Procedure: Jurisdiction 2d* § 4226 (1988 & Supp. 1990) (discussing claim preclusion as bar to state lawsuits and citing cases where federal courts properly enjoined state proceedings on parts of claims that could have, but were not, raised in federal action and on claims that could have been joined as pendent claims in federal cases).

The Supreme Court's opinion in *Chick Kam Choo v. Exxon Corp.*, 486 U.S. at 148, stressing the "strict and narrow" requisites for applying the relitigation exception to the Anti-Injunction Act, suggests that the relitigation exception may not fully protect the preclusive effect of a prior federal judgment. Such an interpretation, however, "seems unduly restrictive. The Chick Kam Choo opinion is ambiguous and does not show that a distinction between claim preclusion and issue preclusion was really considered or intended. If the effects of a judgment are to be enforced by injunction, claim preclusion is often as good a candidate as is issue preclusion." 17 C. Wright & A. Miller, *Federal Practice and Procedure: Jurisdiction 2d* § 4226 at 32 & n.12.1 (Supp. 1990).

Chick Kam Choo presents no difficulty in the instant case. The claims and issues resolved by the Court's September 8, 1989 Judgment are dispositive of all of the Investor Plaintiffs' claims except those that are alleged to have arisen after the Judgment was entered. An injunction may issue restraining state proceedings on these later claims pursuant to the "in aid of jurisdiction" exception to the Anti-Injunction Act, which is outside the scope of *Chick Kam Choo*. *See Chick Kam Choo v. Exxon Corp.*, 486 U.S. at 146-47 (stating that the relitigation exception "is the only one even arguably applicable here").

Judgment Action may easily be stated. The Judgment declaring no duties to defend or indemnify was final as to all claims brought against Royal in the Federal Liability Suits, namely, Cause Nos. 3-87-2384-H, 3-87-1589-H, 3-87-1873-H, 3-87-2113-H, 3-87-2114-H, 3-87-2115-H, 3-87-2116-H, 3-87-2117-H, 3-87-2118-H, 3-87-2119-H, 3-87-2120-H, 3-87-2121-H, 3-87-2122-H, 3-87-2123-H, 3-87-2124-H, 3-87-25-H [sic], 3-87-2126-H, 3-87-2127-H, 3-87-2128-H, 3-87-2129-H, 3-87-2130-H, 3-87-2131-H, 3-87-2132-H, 3-87-2133-H, 3-87-3068-H, and 3-88-1153-H, all of which were consolidated under Cause No. 3-87-2384-H. The Judgment was final as to claims brought under both federal and state laws, including claims under theories of negligence, gross negligence, and violations of the Texas Deceptive Trade Practices Act.[20] The Judgment was final also as to all counterclaims raised by the Federal Declaratory Judgment Action Defendants.

The Judgment was final on all of these claims and counterclaims as to the coverage provided by the following policies: PYA D45334; PYA D 70339; JYN 100825; PLA 172833; PYA 214704; JYN 100329; JYN 100012; JYN 100086; JYN 100090; JYN 100091; JYN 100277; JYN 100329; JYN 100089; PLA 117981; PLA 162920; PLA 162934; PLA 162941; PLA 162942; PLA 162956; PLA 162962; PLA 162915; PLA 162916; PLA 162917; PLA 162929; PLA 162951; PLA 162952; PLA 162953; PLA 162954; PLA 162964; PLA 170503; PLA 170506; PLA 170507; PLA 170510; PLA 170518; PLA 170524; PLA 170525; PLA

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[20] The Court specifies these claims because the Dallas Judgment awarded damages for only these causes of action. *See* PX 90 at 2 (Dallas Judgment).

170526; PLA 170527; PLA 170560; PLA 170563; PLA 170564; PLA 170580; PLA 172831; and PLA 176580. All of these policies were found to be unambiguous, and Royal found to have no duty to defend or indemnify pursuant to them. Furthermore, the Court conclusively determined that policies AYA B28100, AYA B44881, AYA C04186, AYA 124502, AYA B28100, AYA D45124, AYA 214462, AYA 214502, AYA 214525, AYN 514473, and AYN 569768 were not issued by Royal, Royal was not a party to them, and Royal assumed no obligations under them, and owed no duties of defense or indemnity under those policies. The Court also finally judged that policy PQG 127483 provided inland marine coverage, and Royal had no duty to defend or indemnify Quinn-L for any of the allegations in the Federal Liability Suits under that policy. The Court also found that policy PQI C47766 provided computer coverage, and Royal had no duty to defend or indemnify Quinn-L for any of the allegations in the Federal Liability Suits under that policy. Accordingly, all of these claims have been finally adjudicated and the Investor Plaintiffs are barred from relitigating them pursuant to the doctrine of claim preclusion and the relitigation exception to the Anti-Injunction Act.

Furthermore, numerous issues were conclusively determined by the Declaratory Judgment Action that were fully and actually litigated and also were necessary and essential to the Court's Judgment. Among these issues are the following: the Investor Plaintiffs alleged no injury to tangible property constituting an occurrence pursuant to the terms of the policies, they alleged no bodily injury constituting an occurrence pursuant to the terms of the policies, they alleged no personal injury or

bodily injury in the form of mental anguish constituting an occurrence pursuant to the terms of the policies, and the investors alleged no loss of investment that was within the coverage of the policies because the investors purchased intangibles, not real property.

Furthermore, these issues were determined not solely as to particular policies, but rather as to the language used in many policies, some not brought before the Court until the present action. In other words, the Court finally interpreted the language in certain policy clauses, and the issue of the meaning of those clauses was necessary and essential to the Court's Judgment. Also, contrary to the Investor Plaintiffs' assertion that it was not until the Dallas State Action that mental anguish was pleaded as an injury, in fact that issue was actually litigated and finally determined by this Court by its Order of April 14, 1989 and the entry of Summary Judgment pursuant to that Order on April 27, 1989. *See supra* pp. 7-10 & n.6.

Accordingly, the Court finds that all of the above-mentioned claims and issues have previously been determined by this Court in Judgments that were appealable pursuant to Federal Rule of Civil Procedure 54. These claims and issues having been finally adjudicated, the Investor Plaintiffs are barred from pursuing or raising them in state court actions pursuant to the doctrine of claim preclusion and issue preclusion as applicable under the relitigation exception to the Anti-Injunction Act.

C. The "Post-Judgment" Claims.

Although all of the Investor Plaintiffs' claims in the state court actions are premised upon, and dependent

upon, the claims and issues previously resolved by the Court, the Investor Plaintiffs also raise claims in their Brownsville actions based on Royal's conduct after the entry of the 1989 Judgment. The Investor Plaintiffs raise claims sounding in tort regarding Johnston's representation of Quinn-L in the Dallas State Action, and also claim that this post-Judgment representation of Quinn-L raises issues of waiver and estoppel as to Royal's duties to defend and to indemnify Quinn-L under the policies that previously were determined to impose no such duties upon Royal.

Merely reciting these "new" claims makes clear that they cannot be addressed nor resolved removed from the context of the issues of Royal's duty to defend or to indemnify Quinn-L in the underlying fraud actions. Indeed, insofar as the Investor Plaintiffs' alleged damages in the Brownsville action consist of the Dallas State Judgment (trebled, of course), the Investors have no injury independent of the issues of insurance coverage already determined by the Court and presently before the Court in this action.[21] Put another way, absent the injunctive

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[21] Every single claim brought against Royal in the Brownsville Liability Action, Cameron County Court Cause No. 90-09-4464-A, is grounded on the Dallas Judgment. *See* PX 103 (Investor Plaintiffs' Original Petitioner) ¶¶ 31-43. Likewise, the Brownsville Declaratory Judgment Action, Cameron County Court Cause No. 90-09-5106-A, seeks a "[j]udgment declaring the Royal Insurance Group . . . liable for the judgment in *Adkisson, et[] al. v. Quinn-L Capital Corp., et[] al.*, Dallas County Court Civil Cause No. 89-11030-M [the Dallas State Action]." PX 109 (Investor Plaintiffs' First Amended Original Petitioner) at 13. Also, every single insurance policy specified in the Brownsville Declaratory Action was subject to the September 8, 1989

relief sought by Royal, the state court in Brownsville could irreparably injure the Court's ability to decide the present case.

In discussing the "in aid of jurisdiction" exception to the Anti-Injunction Act, the Supreme Court has explained that situations like the one now facing the Court are precisely what the exception was designed to address. The Supreme Court stated that there are times when "some injunctive relief may be necessary to prevent a state court from so interfering with a federal court's consideration or disposition of a case as to seriously impair the federal court's flexibility and authority to decide that case." *Atlantic Coast Line R. R. v. Brotherhood of Locomotive Engineers*, 398 U.S. at 295.

This is precisely such a case; absent injunctive relief the Court will likely loss the ability to decide this case (filed well before either Brownsville Action) and may well have its prior Judgments (which are inextricably intertwined with the present action) nullified by contrary state court decrees. Without and [sic] injunction, "the Federal District Court would be limited in the action it might take. If the Federal District Court were to have unfettered power to decide for or against the [parties], and to write such decree as it deem[s] necessary . . . it must be freed of all restraints from the other tribunal." *Capital Service, Inc. v. NLRB*, 347 U.S. at 505-06, 74 S.Ct. at 702-03. The Court must be allowed "[t]o exercise its jurisdiction freely and fully," *id.*, so it may decide the entire

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Judgment and also is presently before the Court in this action. *See id.* ¶ 18, at 9 (listing policies PYA D45334, PLA 172833, PYA D70339, and JYN 100825).

controversy before it, and not merely whatever scraps of the case that might remain following a decision by the Brownsville tribunal.

Also, as has been noted above, the Court finds that *In re Corrugated Container Antitrust Litigation*, 659 F.2d at 1334-35, is very much on point with both the factual circumstances of and the law applicable to the present case. In upholding the multidistrict court's injunction in that case, the Fifth Circuit noted the complexity of the case, the amount of the court's time it had consumed, the numerous claims brought in the litigation, and the many parties involved in holding that the state court should not be allowed to "interfere with the multidistrict court's ability to dispose of the broader action pending before it." *Id.* at 1335. The same considerations apply to the present action, and allowing parallel state court litigation could only undermine the Court's continuing jurisdiction over the case. As the Eleventh Circuit explicitly stated in *Battle v. Liberty National Life Insurance Co.*, 877 F.2d at 882, and as the Fifth Circuit implicitly recognized in the *Corrugated Container* case, "lengthy, complicated litigation is the virtual equivalent of a res," jurisdiction over which may require an injunction against proceedings in another forum.

Furthermore, again as in the *Corrugated Container* case, the Court finds that the Investor Plaintiffs' attorneys " 'have taken, and manifested an intention to continue to take, actions threatening this court's exercise of its proper jurisdiction and the effectuation of its judgments, by filing and threatening to file duplicative and harassing litigation in the courts of [Texas] and by seeking therein orders disrupting the proceedings in [the present action].' " *Id.* (quoting the multidistrict court). Indeed, the Investor

Plaintiffs not only have sought to cripple this Court's "exercise of its proper jurisdiction and the effectuation of its judgments" through collusive and duplicative litigation, but also seek to insulate themselves from the consequences of their acts by pleading in the Brownsville Liability Action that Royal "is estopped from collaterally attacking the [Dallas] judgment through any allegations of fraud or collusion." PX 103 ¶ 43 (Investor Plaintiffs' Original Petition).

Accordingly, the Court finds that the Court has the authority to issue an injunction restraining the Investor Plaintiffs from pursuing any and all of the actions now pending in the Brownsville Actions.

D. Standards For Preliminary Injunctive Relief.

In the Fifth Circuit,

> [t]here are four elements a movant must establish to obtain a preliminary injunction: (1) that there is a substantial likelihood of success on the merits; (2) that there is a substantial likelihood that he will suffer irreparable injury if the injunction is not issues [sic]; (3) that any threatened injury outweighs the damage the injunction might cause the opponent; and (4) that the injunction will not disserve the public interest.

Griffin v. Box, 910 F.2d 255, 259 (5th Cir. 1990) (citing *Apple Barrel Productions, Inc. v. Beard*, 730 F.2d at 386).

The Court finds that Royal has demonstrated that there is a substantial likelihood it will succeed on the merits and will obtain a permanent injunction prohibiting

the Investor Plaintiffs and Quinn-L from proceeding further in the Brownsville Actions. The Brownsville litigation is, as the above discussion demonstrates, just another attempt by the Investor Plaintiffs to evade the jurisdiction of this Court, to emasculate its ability to decide the present case, and to evade its prior judgments. Not only have the Investor Plaintiffs filed harassing and duplicative litigation, but they also entered into a secret side deal with Lovell which produced the default judgment in the Dallas State Action. Furthermore, in that case the Investor Plaintiffs' counsel failed to disclose this Court's September 8, 1989 Judgment to the Dallas court, preventing the court from considering the preclusive effect of that Judgment.

In addition, the Court notes that whereas under the Supreme Court's *Chick Kam Choo* decision this Court's application of the doctrine of claim preclusion is somewhat restricted in cases involving the relitigation exception of the Anti-Injunction Act,[22] when considering the merits of Royal's application for a permanent injunction the Court will apply the Fifth Circuit's "transactional" analysis in order to determine which causes of action were adjudicated in the prior action and hence precluded from further litigation.[23] Under the Fifth Circuit standard,

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[22] *See supra* note 19 and accompanying text.

[23] To determine whether the same cause of action is involved in two suits, the Fifth Circuit has adopted the transactional test of the *Restatement (Second) of [Judgments]*. Section 24 of the *Restatement* provides in part:

> (1) When a valid and final judgment rendered in an action extinguishes the plaintiff's

Royal's likelihood of success on the merits is particularly enhanced.

Second, the Court finds that Royal is faced with the prospect of imminent and irreparable injury if the injunction does not issue. In this regard, the Court first notes that the Anti-Injunction Act specifically permits injunctions in situations like those presented by this case, and Royal has a right to rely on that Act to enforce the judgments of the Court. *See Quintero v. Klaveness Ship Lines*, 914 F.2d at 721. The Supreme Court recognized in *Parsons Steel, Inc. v. First Alabama Bank*, 474 U.S. 518, 524 (1986) that parties have a right to obtain federal interpretation and protection of federal courts' judgments, and to preserve them from compromise and possible nullification in state actions. The Supreme Court in *Parsons Steel* found, pursuant to *Toucey v. New York Life Insurance Co.*, 314 U.S. 118 (1941), that where "the prevailing party in the federal action [seeks] an injunction against relitigation in state court as soon as the opposing party commenced the state action, and before there was any resolution of the res judicata issue by the state court," injunctive relief may be appropriate. *Parsons Steel, Inc. v. First Alabama Bank*, 474 U.S. at 524. Indeed, the Supreme Court held that in order that the Anti-Injunction Act be

---

> claim pursuant to the rules of merger or bar . . . , the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.

Republic Supply Co. v. Shoaf, 815 F.2d 1046, 1053 (5th Cir. 1987) (citation omitted).

applied so as not to violate the values of the Full Faith and Credit Act, 28 U.S.C. § 1738, an injunction must issue before the state court has ruled on the merits of the res judicata issue. *See id.; see also Woods Exploration & Producing Co. v. Aluminum Co. of America,* 438 F.2d at 1312 (stating that the relitigation exception to the Anti-Injunction Act "assures the winner in federal court that he will not be deprived of the fruits of his victory by a later contrary state judgment").

Put simply, the irreparable injury facing Royal is the compromise or nullification of the Court's September 8, 1989 Judgment and the Court's ability to adjudicate the present controversy. The Court also is aware that if Royal were allowed to lose the benefit of the prior Judgment, litigants' expectations of finality of federal court judgments would be eroded and collusive behavior designed to evade federal courts' jurisdiction would be encouraged.

Third, the balance of equities in this case overwhelmingly favors Royal. Royal's potential hardship is staggering, whereas the injunction's damage to the Investor Plaintiffs and the Quinn-L Entities is imperceptible because they have no right to relitigate claims and issues fully litigated and determined by a final, appealable judgment. Furthermore, Defendants' conduct in litigating these issues has sunk beneath that criticized by the *Corrugated Container* court, as already discussed above at some length.

Finally, the interests of the public will not be disserved by the issuance of an injunction in this case. As the Court has already noted, principles of federalism are

enhanced when an injunction properly is issued pursuant to the exceptions to the Anti-Injunction Act because "nothing would be as productive of friction between the state and the federal courts as to permit a state court to interpret and perhaps to upset such a judgment of a federal court." *Jacksonville Blowpipe Co. v. Reconstruction Finance Corp.*, 244 F.2d at 400 (quoted in *International Ass'n of Machinists & Aerospace Workers v. Nix*, 512 F.2d at 130). Also, today's ruling will operate both to conserve judicial resources and to foster "reliance on judicial action by minimizing the possibility of inconsistent decisions." *Montana v. United States*, 440 U.S. 147, 154 (1979).

III. Conclusion.

For the reasons stated above, Royal has met the standards for obtaining preliminary injunctive relief in the Fifth Circuit, and such relief is allowed under exceptions to the Anti-Injunction Act. Accordingly, Royal's Application for Injunctive Relief is **GRANTED**. Plaintiffs Royal Insurance Company of America and Royal Lloyds of Texas shall submit a proposed Order by *noon, December 6, 1990.*

SO ORDERED.

DATED: November 30, 1990.

/s/ Barefoot Sanders
BAREFOOT SANDERS,
CHIEF JUDGE
UNITED STATES
DISTRICT COURT
NORTHERN DISTRICT
OF TEXAS

Supreme Court, U.S.
FILED
MAR 9 1994
OFFICE OF THE CLERK

No. 93-1331

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

QUINN-L CAPITAL CORPORATION, *et al.*,
Petitioners,

v.

ROYAL INSURANCE COMPANY OF AMERICA and
ROYAL LLOYDS OF TEXAS,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Court of Appeals correctly held that the citizenship of an unincorporated Lloyds association is not dependent on the citizenship of its statutory attorney-in-fact, because the attorney-in-fact is not a "member" of the association as required by *Carden v. Arkoma Assocs.*, 494 U.S. 185 (1990), but is merely an agent of the underwriters who are the association's members.

2. Whether the Court of Appeals correctly applied the principles articulated in *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140 (1988), and *Atlantic Coast Line R.R. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281 (1970), to hold that the district court could enjoin relitigation in state court of matters decided by a prior federal judgment.

3. Whether the Court of Appeals correctly held that the district court could continue to adjudicate this declaratory judgment action, despite the filing of state court litigation raising the same issues, where (i) this action was brought to enforce a prior federal judgment, (ii) the new issues were injected into this action by the defendants themselves as affirmative defenses, and (iii) significant proceedings had occurred in the district court before the state court litigation was filed.

4. Whether the Court of Appeals correctly concluded that no genuine dispute of material fact had been demonstrated with respect to the privity between the two groups of defendants, and thus that one defendant group could be held on summary judgment to be bound by a prior judgment against the other defendant group.

PARTIES TO THE PROCEEDING

The parties to the proceeding are as stated in the petition. Pursuant to Supreme Court Rule 29.1, respondent Royal Insurance Company of America is wholly owned by The Royal Group, Inc., which is, in turn, wholly owned by Royal Insurance plc London. Royal Insurance Company of America has no subsidiaries (other than wholly owned subsidiaries). Respondent Royal Lloyds of Texas is an unincorporated association whose attorney-in-fact is Royal Lloyds, Inc.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

STATEMENT OF THE CASE

This case is part of what the Court of Appeals termed a "tangled web of litigation" created by petitioners that has ensnared the parties and the federal and state courts in Texas for seven years. Pet. App. A56. All of this litigation centers on the petitioners' attempts to reap windfall damages as a result of their lost investments in real-estate limited partnerships during the 1980s. After pursuing the partnerships' organizers, lawyers and accountants, petitioners eventually set their sights on the respondent insurance companies, which had insured the partnerships' organizers against very different risks.

The insurance companies sought in this case to establish, once and for all, that they have no liability to peti-

tioners. The lower courts have now agreed that no such liability exists and that the time has come to put an end to this protracted litigation.

A. The Federal Investor Actions

During the 1970s and early 1980s, the Quinn-L entities ("Quinn-L") and their principal, S. Mark Lovell, organized and promoted a number of real-estate limited partnerships. Pet. App. A26-A27. Mr. Lovell is the sole shareholder of every Quinn-L entity except Quinn-L Capital; as to Quinn-L Capital, he is the sole owner of its voting stock and the beneficial owner of all of its assets, if any. *Id.* at A27 & n.1.

In 1987, after the limited partnerships had been foreclosed upon and Mr. Lovell had declared personal bankruptcy, Quinn-L was sued by 157 of its investors ("the Investors") in twenty-six separate lawsuits in the U.S. District Court for the Northern District of Texas. *Id.* at A26. These suits were consolidated before Judge Barefoot Sanders.

The Investors' complaints initially named as defendants not only Quinn-L, but also several law firms, accounting firms and individuals associated with Quinn-L. *Id.* The Investors asserted similar claims against Mr. Lovell in his personal bankruptcy proceeding. *Id.* at A27 n.2.

B. The First Federal Declaratory Judgment Action

In response to the Investors' lawsuits, Quinn-L demanded that its insurers, respondents Royal Insurance Company of America and Royal Lloyds of Texas (collectively, "Royal"), assume its defense. Pet. App. A26. Royal offered to do so, while reserving its right to contest coverage, and Quinn-L agreed to that arrangement. *Id.*

On May 10, 1988, Royal filed a federal declaratory judgment action against Quinn-L to establish that its

insurance policies did not impose any duty to defend or indemnify Quinn-L against the Investors' claims. *Id.* This action was also assigned to Judge Sanders.

The Investors moved to intervene in the declaratory judgment action on June 6, 1988. *Id.* The court denied the motion on the grounds that the Investors were not real parties in interest to the coverage dispute and that their interest in establishing coverage was adequately represented by Quinn-L. *Id.*

On April 3, 1989, the non-party Investors and Quinn-L filed a joint motion to substitute the Investors' counsel for Quinn-L's counsel in the declaratory judgment action. R. A-7 Ex. 32. The Investors and Quinn-L represented to the court that they had "reached an agreement in principle for settlement of the Quinn-L Litigation." R. A-7 Ex. 32 at 2-3. The Investors had previously concluded a settlement with Mr. Lovell personally, whereby he agreed to "cooperate" with the Investors in their lawsuits against Quinn-L. Pet. App. A26-A27.

On April 14, 1989, the court granted Royal's motion for summary judgment against Quinn-L. *Id.* at A27. The court held that the Investors had "allege[d] no injury to tangible property which could constitute an 'occurrence' " under the policy terms, and that "none of the [alleged] losses constitutes 'property damage' as required by the policy." *Id.* at A27-A28. The court further held that the Investors had not shown that their alleged "personal injuries (in the form of mental anguish) were caused by an 'occurrence.' " *Id.* at A28. The court formally entered summary judgment against Quinn-L on April 27, 1989, reiterating that the Investors had not "as a matter of law . . . state[d] a claim within the coverage provided by the policies." *Id.* at A27-A28; Supp. App. 66.

C. The Dismissal of the Federal Investor Actions

On August 3, 1989, the Investors moved the district court to dismiss all of their pending lawsuits against Quinn-L, again representing that the Investors and Quinn-L had "reached an agreement in principle for settlement of [their] claims." Pet. App. A28. On August 28, 1989, pursuant to the Investors' request, the court dismissed all of their claims against Quinn-L. *Id.*

D. The Court Enters a Final Declaratory Judgment

On September 8, 1989, the district court entered a final declaratory judgment for Royal in its action against Quinn-L. Pet. App. A28. The court reiterated that the Investors had not "allege[d] an 'occurrence,' as defined by the policies" and had not "alleged 'property damage,' or 'personal injury' as defined by the policies." *Id.* at A28, A39-A40. The judgment was not appealed. *Id.* at A28.

E. The *Adkisson* Action in Dallas County Court

Five days later, on September 13, 1989, the Investors refiled their state-law claims against Quinn-L in Dallas County court in an action styled *Adkisson v. Quinn-L Capital Corp.* Pet. App. A28-A29. In October 1989, Mr. Lovell, through his personal attorney Broocks Greer, asked Royal to defend Quinn-L in the *Adkisson* action. *Id.* at A29. Royal responded by denying that any coverage existed for the Investors' claims. *Id.* Royal nonetheless offered, as in the earlier federal actions, to provide a defense under a reservation of rights. *Id.*

While awaiting Quinn-L's response to its offer, Royal retained attorney Coyt Randal Johnston to represent Quinn-L in *Adkisson. Id.* Mr. Johnston filed a general denial to the *Adkisson* complaint on Quinn-L's behalf. *Id.*

On January 9, 1990, Mr. Lovell refused Royal's offer of a defense under a reservation of rights, even though

Mr. Lovell, himself an attorney, understood that neither he nor Quinn-L had any resources with which to hire counsel. *Id.* Royal immediately instructed Mr. Johnston to take no further action on Quinn-L's behalf in *Adkisson*. *Id.*

Royal and Mr. Johnston repeatedly notified Mr. Lovell and Mr. Greer that Quinn-L would have to retain counsel to replace Mr. Johnston. *Id.* at A30. But neither Mr. Lovell nor Mr. Greer took any steps to retain counsel for Quinn-L. R. K-2 Ex. 19. Mr. Johnson filed a motion to withdraw, which was granted on May 30, 1990. Pet. App. A30.

On May 21, 1990, after having been served with Mr. Johnston's motion to withdraw, the Investors served 600 requests for admissions on Quinn-L. *Id.* at A30; Supp. App. 74. Mr. Johston answered the requests, denying "by far the majority of them." Pet. App. A30.

On June 1, 1990, after his motion to withdraw had been granted, Mr. Johnston wrote to Mr. Lovell concerning the requests for admissions, explaining that the answers could be amended, if appropriate. R. K-1 Ex. 14. In a letter replying to Mr. Johnston, Mr. Lovell professed to have "no responsibility" for Quinn-L's defense in *Adkisson*, citing his earlier "settlement with the [Investor] plaintiffs." R. K-1 Ex. 16. He forwarded Mr. Johnston's letter to his own counsel and to the Investors' counsel. R. K-1 Ex. 15; R. C-4 at 241-42.

On June 27, 1990, the Investors moved to strike Quinn-L's responses to the requests for admissions, asserting that Mr. Johnston had prepared them without consulting Quinn-L. Pet. App. A30. Although Mr. Lovell was aware that the motion had been filed and was scheduled for hearing, he did not obtain counsel for Quinn-L, or ratify or amend the answers, or otherwise oppose the motion. R. K-3 Ex. 29 at 9-10; R. C-4 at 262. A visiting judge granted the Investors' unopposed motion to deem the denied requests "admitted." Pet. App. A30.

When the action was called for trial on August 7, 1990, Mr. Lovell still had not obtained counsel for Quinn-L, even though he was aware of the trial schedule. Accordingly, no appearance was made on behalf of Quinn-L. *Id.* Offering to the court nothing more than the 600 deemed admissions and their own calculation of damages, the Investors immediately obtained a default judgment against Quinn-L of $741 million. *Id.* Only $16 million of that amount was attributed to the Investors' actual out-of-pocket investment losses. R. K-2 Ex. 25.

F. The Second Federal Declaratory Judgment Action

On March 9, 1990, while the *Adkisson* action was pending, Royal filed this action to enforce the district court's earlier declaratory judgment on policy coverage. Pet. App. A32. On August 15, 1990, one week after the *Adkisson* judgment, Quinn-L filed an answer raising a number of affirmative defenses, including the affirmative defenses that Royal was barred by "estoppel," "waiver" and "contributory negligence" from obtaining its requested relief. *Id.*; Supp. App. 8. Quinn-L based these defenses on Royal's alleged representations about the scope of the first declaratory judgment and on Royal's and Mr. Johnston's alleged conduct in the *Adkisson* action.

G. Mr. Lovell Assigns Quinn-L's Claims to the Investors

On September 4, 1990, Mr. Lovell, on behalf of Quinn-L, executed an agreement assigning Quinn-L's claims, if any, against Royal to the Investors. Pet. App. A31. In return, the Investors promised to pay Mr. Lovell 5% of any future recoveries against Royal in excess of the $741 million *Adkisson* judgment. *Id.*

H. The Actions in Cameron County Court

The Investors then proceeded to the Cameron County court in Brownsville, Texas, to file two separate actions against Royal.

1. *The Investors' Cameron County Liability Action*

The Investors filed the first of these actions on September 4, 1990, the same day that they entered into the assignment agreement with Quinn-L. Pet. App. A31. In that action, the Investors sought, "[a]s judgment creditors and assignees of the Quinn-L Entities," to hold Royal "responsible for the payment of the Judgment entered [in *Adkisson*]." R. K-3 Ex. 26 at 14. They argued that Royal was liable to them "for the entirety of the judgment" under the terms of its insurance policies. Pet. App. A44-A45. They also contended that Royal had wrongfully denied coverage and an unconditional defense in *Adkisson* and had "hire[d] counsel whose conduct was the direct cause of the adverse judgment"—acts that were characterized as "gross negligence," as a violation of Royal's "duty of good faith and fair dealing," and as grounds for holding that Royal was barred by waiver or estoppel from denying coverage. R. K-3 Ex. 26 at 15-17. The Investors sought damages against Royal of $2.2 billion, of which Mr. Lovell would receive $74 million as a result of his agreement with the Investors. R. K-3 Ex. 26.

On September 5, 1990, even before Royal was served with the complaint, the Investors obtained a trial date of December 10, 1990. Pet. App. A31. In addition, they quickly filed a motion for summary judgment, which was set to be heard on November 8, 1990. *Id.*

2. *The Investors' Declaratory Judgment Action*

The same Investors filed a second action in the same Cameron County court on September 17, 1990, seeking a declaratory judgment that Royal was liable to them for the *Adkisson* judgment. *Id.* The Investors again claimed that the damages awarded to them in *Adkisson* were for "injuries which are covered by the relevant insurance policies issued by [Royal]." R. K-3 Ex. 27 at 11-12. They also asserted that Royal "has waived its right to, or is estopped from denying coverage under the

policies because of its conduct with respect to the Quinn-L Entities." *Id.*

I. The Injunction Against the Cameron County Actions

On November 30, 1990, the district court in this action preliminarily enjoined Quinn-L and the Investors from prosecuting the two Cameron County actions. Supp. App. 56-106. The court found that the Cameron County actions were "just another attempt by the Investor Plaintiffs to evade the jurisdiction of this Court, to emasculate its ability to decide the present case, and to evade its prior judgments." *Id.* at 103. The Investors and Quinn-L appealed.

J. The District Court Grants Summary Judgment

On December 20, 1991, while the preliminary injunction appeal was pending, the district court granted Royal summary judgment on all of the parties' claims and affirmative defenses. Supp. App. 1-33. The court held that its prior declaratory judgment conclusively determined that Royal's policies imposed no duty to defend or indemnify Quinn-L against the sorts of claims that the Investors asserted in *Adkisson*. Supp. App. 17-21. The court then held that, because the Investors were already in privity with Quinn-L during the first declaratory judgment action, they as well as Quinn-L were bound by the resulting judgment. Supp. App. 21-22. The court also held that the affirmative defenses of waiver, estoppel and contributory negligence failed as a matter of law on multiple grounds, and thus provided no basis for precluding the summary judgment sought by Royal. Supp. App. 22-29.

K. The Fifth Circuit in *Royal I* Decides the Preliminary Injunction Appeal

On May 5, 1992, the Court of Appeals for the Fifth Circuit issued its opinion on the preliminary injunction appeal, affirming in part, reversing in part and remanding

for further proceedings. *Royal Ins. Co. v. Quinn-L Capital Corp.*, 960 F.2d 1286 (5th Cir. 1992) (*"Royal I"*) (Pet. App. A25-A57).

The Fifth Circuit first held that the district court had the authority under the "protect or effectuate judgments" exception to the Anti-Injunction Act, 28 U.S.C. § 2283 (1988), to enjoin relitigation of whether Royal's insurance policies provided coverage against the Investors' claims. Pet. App. A38-A46. The court further held that the Investors as well as Quinn-L were bound by the first declaratory judgment. *Id.* at A46-A49.

The Fifth Circuit then held that the preliminary injunction against state court litigation of the parties' remaining claims—*i.e.*, the waiver, estoppel and tort claims that were raised as affirmative defenses in the district court—could not be sustained under the Anti-Injunction Act's "in aid of jurisdiction" exception. *Id.* at A49-A54. The court explained that "[t]he Cameron County court posed no threat to the district court's continuing jurisdiction to decide [these] claims," since both courts could concurrently adjudicate the claims until one or the other entered final judgment. *Id.* at A52.

Finally, the Fifth Circuit denied the Investors' and Quinn-L's request to vacate the summary judgment that had been entered while the appeal was pending. *Id.* at A54-A56. The court explained that vacating the orders would be an "academic exercise," since "the district court would be free to re-enter its orders the moment after they were vacated." *Id.* at A56. And the court added that this result was equitable, given that the Investors and Quinn-L "created this tangled web of litigation by seeking to evade the effect of the first declaratory judgment action." *Id.*

L. The District Court Enters Final Declaratory and Injunctive Relief

On July 1, 1992, the district court granted Royal's application for entry of final declaratory relief against

Quinn-L and the Investors. Supp. App. 51. The court also entered a permanent injunction that barred Quinn-L and the Investors from relitigating any of the claims or issues decided in either the present action or the first declaratory judgment action. *Id.* at 48. The Investors and Quinn-L again appealed.

M. The Fifth Circuit in *Royal II* Affirms the District Court's Declaratory Judgment and Injunction

On September 27, 1993, the Fifth Circuit unanimously affirmed the district court's declaratory judgment and permanent injunction against state court relitigation of the matters decided by that judgment. *Royal Ins. Co. v. Quinn-L Capital Corp.*, 3 F.3d 877 (5th Cir. 1993) (*"Royal II"*) (Pet. App. A1-A24).

The Fifth Circuit initially held that subject-matter jurisdiction exists over the entire case, given the complete diversity of citizenship between Royal Insurance and Royal Lloyds, on the one hand, and Quinn-L and the Investors, on the other. Pet. App. A7-A9. The court rejected the argument that the Texas citizenship of Royal Lloyds' attorney-in-fact is relevant to the jurisdictional inquiry, recognizing that the attorney-in-fact is, under Texas law, a mere "agent" of Royal Lloyds' underwriter-members. *Id.* at A8-A9.

The Fifth Circuit then held that the district court was not barred from rendering a declaratory judgment on the affirmative defenses of waiver, estoppel and contributory negligence merely because those defenses were identical to claims pending in the Cameron County actions. *Id.* at A10-A19. The court explained that "principles of federalism and comity" could not be offended by such a declaratory judgment in the circumstances of this case: Royal had sought declaratory relief not "to interfere with the state courts" but instead "to enforce a prior federal judgment"; Quinn-L itself had injected the affirmative defenses

into the case; and "significant proceedings" had taken place in federal court before the Cameron County actions were filed. *Id.* at A16-A17. Moreover, because the district court could enter the declaratory judgment, the court also could, under the Anti-Injunction Act's "protect or effectuate judgments" exception, enjoin relitigation of matters decided by that declaratory judgment. *Id.* at A10-A11.

The Fifth Circuit went on to hold, as it had in *Royal I*, that the district court's first declaratory judgment resolved any dispute as to whether Royal's insurance policies provided coverage for the Investors' alleged injuries. *Id.* at A22-24. The court further held that the Investors, although not parties to the first declaratory judgment action, were bound by that judgment by virtue of their privity with Quinn-L. *Id.* at A21-A22. Finally, the court rejected Quinn-L's and the Investors' challenge to the disposition on summary judgment of the affirmative defenses of waiver, estoppel and contributory negligence. *Id.* at A24.

On November 5, 1993, the Fifth Circuit denied the Investors' and Quinn-L's Suggestion for Rehearing En Banc, which was also treated as a petition for panel rehearing, with no judge requesting a poll. *Id.* at A58.

REASONS FOR DENYING THE PETITION

The decision of the court below is correct. It does not conflict with any decision of this Court or of any other court of appeals. Accordingly, review by this Court is not warranted.

I. THE COURT OF APPEALS' DECISION AS TO THE CITIZENSHIP OF RESPONDENT ROYAL LLOYDS DOES NOT MERIT THIS COURT'S REVIEW

Petitioners first argue (Pet. 8-9, 12-17) that review by this Court is necessary in order to clarify, for purposes of diversity jurisdiction, the citizenship of a small number

of unincorporated Lloyds associations—specifically, those Lloyds associations that do business in Texas and thus are required by state law to appoint a Texas resident as their attorney-in-fact in the state. Simply to articulate this exceedingly narrow question is to demonstrate its unsuitability for review by this Court. There is simply no diversity jurisdiction issue of general importance in this case.

Petitioners do not, and cannot, assert that any conflict exists among the courts of appeals as to the citizenship of a Lloyds association. Nor do petitioners offer any reason to expect that such a conflict will arise in the future. They do not, for example, identify any state outside the Fifth Circuit that requires a Lloyds association to appoint a resident of the state as its attorney-in-fact, or that imposes the same obligations on the attorney-in-fact as does Texas. And in all events, they have no grounds for suggesting that another court would reach a different result or, perhaps as importantly, why this Court should enter the fray before any such conflict arises.

Moreover, while petitioners claim that the decision below is inconsistent with *Carden v. Arkoma Assocs.*, 494 U.S. 185 (1990), they are plainly wrong. In *Carden*, the Court reiterated the well-settled rule that the citizenship of an unincorporated association "depends on the citizenship of 'all the members.'" 494 U.S. at 195 (quoting *Chapman v. Barney*, 129 U.S. 677, 682 (1889)). Here, the Court of Appeals recognized that "[t]his case turns on the question of who constitutes a 'member' of a Lloyds plan insurance association." Pet. App. A7. While petitioners may disagree with the Fifth Circuit's resolution of that question, they have no basis to argue that the court below failed to faithfully follow the holding in *Carden*.

Petitioners object (Pet. 14-15) that the Court of Appeals acted inconsistently with *Carden* in analyzing whether an attorney-in-fact is a "member" of a Lloyds association—a question that the court resolved by refer-

ence to the Texas Insurance Code's treatment of the attorney as a mere agent of the underwriters who form the association. Pet. App. A8-A9. Specifically, they claim that the Court of Appeals' analysis ignores the attorney's supposed role in the "operation and control" of the association. Pet. 13. But *Carden* itself rejected the argument that whether or not a person is a "member" of an association for diversity purposes should turn on the degree to which he exercises "management powers." 494 U.S. at 192-96. Although petitioners complain (Pet. 15-16) that an inquiry into "operation and control" is necessary to ensure that diversity jurisdiction serves its intended purposes, the *Carden* Court rejected such an argument, explaining that issues such as who is, or is not, a "member" of any of the myriad non-corporate artificial entities created under state law are "more readily resolved by legislative prescription than by legal reasoning." *Id.* at 197.

Petitioners' reliance on *Navarro Savings Ass'n v. Lee*, 446 U.S. 458 (1980), for a contrary proposition is misplaced. As the *Carden* Court recognized, *Navarro* dealt not with the citizenship of the litigants, who were eight individual trustees of a business trust, but instead with whether those trustees, as opposed to the trust beneficiaries, were the "real parties to the controversy." 494 U.S. at 191. Accordingly, just as "*Navarro* had nothing to do with the citizenship of the 'trust,' since it was a suit by the trustees in their own names," *id.* at 192-93, *Navarro* has nothing to do with the citizenship of an unincorporated association such as Royal Lloyds, which has sued in its own name. *See id.* at 194 (recognizing that *Navarro* "is irrelevant, since it involved not a juridical person but the distinctive common-law institution of trustees").

In sum, the Court of Appeals' narrow, case-specific decision that Royal Lloyds is not a citizen of Texas is consistent with this Court's authorities and does not conflict with the decision of any other court of appeals. There is

thus no reason for this Court to revisit the Fifth Circuit's conclusion that subject-matter jurisdiction exists here.[1]

II. THE COURT OF APPEALS' APPLICATION OF THE ANTI-INJUNCTION ACT'S "RELITIGATION" EXCEPTION DOES NOT MERIT THIS COURT'S REVIEW

Petitioners next argue (Pet. 8-10, 17-22) that certiorari should be granted to revisit the propriety of the district court's injunction against relitigation in state court of the policy coverage issues decided in the first declaratory judgment action. They contend (Pet. 17) that, in assessing whether the district court's earlier declaratory judgment decided the same policy coverage issues that are presented in this case and in the Cameron County cases, the Fifth Circuit "employed a dramatically opposite rule of construction" than the one employed by this Court in *Atlantic Coast Line R.R. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281 (1970), and *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140 (1988). But each of petitioners' four "rule[s] of construction" applicable to Anti-Injunction Act cases was, in fact, expressly recognized and fully honored by the Fifth Circuit in this case. Accordingly, review by this Court plainly is unwarranted.

First, petitioners observe (Pet. 17-18) that the Anti-Injunction Act permits only an injunction that "falls within one of [its] three specifically defined exceptions," which cannot "be enlarged by loose statutory construc-

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[1] Subject-matter jurisdiction is also justified in this case as an exercise of ancillary jurisdiction—a ground accepted by the Court of Appeals with respect to Royal's coverage claims (Pet. App. A34-A35), but not with respect to petitioners' affirmative defenses (*id.* at A5-A6). If ancillary jurisdiction is to serve its intended purpose of enabling litigants "to secure or preserve the fruits and advantages" of a prior federal judgment, *Local Loan Co. v. Hunt*, 292 U.S. 234, 239 (1934), a district court's ancillary jurisdiction should extend not only to requests to enforce the prior judgment, but also to affirmative defenses raised to such enforcement.

tion." *Atlantic Coast Line*, 398 U.S. at 286-87; *accord Chick Kam Choo*, 486 U.S. at 146. But the Fifth Circuit twice acknowledged this rule in its *Royal II* opinion, noting that "those [three] exceptions are exclusive and that federal courts may not craft new ones." Pet. App. A15 (citing *Atlantic Coast Line*, 398 U.S. at 286-87); *see also* Pet App. A10. The court went on to recognize, however, that the injunction here falls squarely within one of those three exclusive exceptions—*i.e.*, the "relitigation" exception for injunctions to "protect or effectuate [the court's] judgments," 28 U.S.C. § 2283 (1988). Pet. App. A10. This is thus not a case, as was *Atlantic Coast Line*, where the lower court has purported to create a new, non-statutory exception to the Act. *See* 398 U.S. at 286-87.

Second, petitioners observe that " '[a]ny doubts as to the propriety of a federal injunction against state court proceedings should be resolved in favor of permitting the state courts to proceed.' " Pet. 19 (quoting *Atlantic Coast Line*, 398 U.S. at 298). But the Fifth Circuit expressly acknowledged this rule as well in *Royal II*, noting the Act's "presumption in favor of denying an injunction." Pet. App. A-15; *see also id.* at A38. The court below simply concluded that no doubts could exist as to the propriety of a relitigation injunction in this case, because "[t]he *only* reasonable reading of the first declaratory judgment opinion" was one that decided the precise coverage issues presented in this case and in the Cameron County actions. *Id.* at A23 (emphasis added). This case thus presented a situation entirely unlike the one in *Atlantic Coast Line*, where an earlier judgment could not be construed as deciding issues raised in a later case without "stretch[ing] the content of the words well beyond the limits of reasonableness." 398 U.S. at 290.

Third, petitioners assert that a court can enjoin relitigation only of what was " 'actually litigated and decided,' " and not of what the earlier order was merely " '*intended* to say.' " Pet. 19 (quoting *Chick Kam Choo*, 486 U.S.

at 148). Again, the Fifth Circuit expressly acknowledged this "actually litigated and decided" requirement. *See* Pet. App. A22; *see also id.* at A8 (citing *Chick Kam Choo,* 486 U.S. at 148). As to the "actually decided" component of the requirement, the court held that the earlier declaratory judgment decided not only, as petitioners maintain, that the Investors had not alleged property damage or personal injury in their then-pending federal suits, but also that the Investors had not alleged an "occurrence" or "accident" arising out of the failure of the Quinn-L partnerships. *Id.* at A23. And as to the "actually litigated" component, the court held that the question whether the Investors had stated an "occurrence" or "accident" within Royal's policy coverage "actually was litigated" in the first declaratory judgment action. *Id.* In short, contrary to petitioners' argument, the Fifth Circuit was not "render[ing] a *post hoc* judgment as to what [an] order was *intended* to say," *Chick Kam Choo,* 486 U.S. at 148, but rather was examining the district court's orders and the parties' pleadings in the earlier action to determine what was, in fact, decided.

Finally, petitioners assert (Pet. 21) that "the parties' conduct is relevant" to determine the propriety of a relitigation injunction. As noted above, however, in deciding what was "actually litigated" in the first declaratory judgment action, the Fifth Circuit did, in fact, examine the parties' conduct as evidenced by their pleadings in that action. Pet. App. A23. This assertion does not, therefore, advance petitioners' cause.

Petitioners appear to suggest (Pet. 21) that the court below was also required to give determinative weight to certain out-of-court statements by Royal that are claimed to reflect a narrower interpretation of the declaratory judgment. But no such requirement can be discerned in this Court's decisions. This Court has indicated only that consideration of parties' in-court conduct may be appropriate to resolve "lingering doubts" as to the meaning of

a decision. *Atlantic Coast Line*, 398 U.S. at 290. The Fifth Circuit obviously had no such "lingering doubts" here, given its conclusion that the declaratory judgment was susceptible of "only [one] reasonable reading." Pet. App. A23.

Petitioners also erroneously contend (Pet. 19) that the injunction against relitigation of the coverage issues is inappropriate because the Cameron County actions supposedly involve "different issues" and were "brought by persons who were not parties to [that] action." But the Fifth Circuit specifically held in *Royal I*, and necessarily reaffirmed in *Royal II*, that the coverage issues in Cameron County are identical to the coverage issues in the first declaratory judgment action. Pet. App. A44-A46. The Fifth Circuit also specifically held that the Investors, while not parties to the first declaratory judgment action, were bound by the resulting judgment by virtue of their privity with Quinn-L. *Id.* at A21-A22; *see also id.* at A46-A49. It is thus evident that, although petitioners contend that the Fifth Circuit ignored the "rule[s] of construction" applicable under the Anti-Injunction Act's "relitigation" exception, petitioners' real complaint is that the Fifth Circuit applied those very rules to reach a result with which they disagree.

Nor does the particular relitigation injunction in this case offend the principles of federalism and comity underlying the Anti-Injunction Act. Indeed, as the Fifth Circuit has recognized, such an injunction actually promotes federalism and comity principles, because "nothing would be as productive of friction between the state and the federal courts as to permit a state court to interpret and perhaps to upset . . . a judgment of a federal court." *Jacksonville Blow Pipe Co. v. Reconstruction Fin. Corp.*, 244 F.2d 394, 400 (5th Cir. 1957). In short, petitioners' fact-specific challenge to the relitigation injunction here, which presents no conflict with

the decisions of this Court or the other courts of appeals, is obviously unworthy of this Court's attention.

III. THE COURT OF APPEALS' DECISION THAT DECLARATORY RELIEF IS PERMISSIBLE IN THE CIRCUMSTANCES OF THIS CASE DOES NOT MERIT THIS COURT'S REVIEW

Petitioners further contend (Pet. 9-11, 22-28) that review is necessary to prevent litigants from "circumvent-[ing]" the Anti-Injunction Act. They apparently claim that such circumvention occurs whenever a party files a declaratory judgment action in federal district court and, after an action raising the same issues is later filed in state court, continues to litigate the federal action to a final judgment. The Fifth Circuit's contrary decision, which held simply that the district court could continue to exercise its jurisdiction over the pending federal action in the particular context of this case, is fully consistent with the decisions of this Court and other courts of appeals. Therefore, no further review is warranted.

This Court reiterated only last Term that "federal courts and state courts often find themselves exercising concurrent jurisdiction over the same subject matter and when that happens a federal court generally need neither abstain (*i.e.*, dismiss the case before it) nor defer to the state proceedings (*i.e.*, withhold action until the state proceedings have concluded)." *Growe v. Emison*, 113 S. Ct. 1075, 1080 (1993); *see also Colorado River Water Conserv. Dist. v. United States*, 424 U.S. 800, 817 (1976) ("Generally, as between state and federal courts, the rule is that 'the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction.' ") (quoting *McClellan v. Carland*, 217 U.S. 268, 282 (1910)). Accordingly, contrary to the fundamental premise of petitioners' assertions, federalism and comity principles do not generally bar a federal court from proceeding to judg-

ment simply because an action raising similar issues is subsequently filed in state court.

Moreover, while this Court has recognized certain abstention doctrines under which federal courts are to abstain or defer to state proceedings, *see Growe*, 113 S. Ct. at 1080, none of these doctrines has any application to this case. This case does not, for example, interfere with the State of Texas's ongoing prosecutorial or regulatory activities. Nor does it present "difficult questions of state law bearing on important matters of state policy." *Id.*; see Pet. App. A16 (recognizing that petitioners were urging "a new type of abstention"). This case does not, therefore, fit within any of the recognized categories of cases in which this Court has said that district courts should not exercise jurisdiction over a pending controversy.

The decision below does not, as petitioners suggest (Pet. 25), conflict with *California v. Grace Brethren Church*, 457 U.S. 393 (1982), which held only that the Tax Injunction Act's prohibition on suits to "enjoin, suspend or restrain" the collection of state taxes bars declaratory as well as injunctive relief. The Court's principal reason for applying the Tax Injunction Act to declaratory as well as injunctive relief was "the very language of the Act," which does not speak solely in terms of injunctions, but instead itself "suggests that a federal court is prohibited from issuing declaratory relief in state tax cases." *Id.* at 408. The Court also emphasized that construing the Tax Injunction Act to bar declaratory relief was necessary to serve the Act's purpose of preventing " 'interfer[ence] with so important a local concern as the collection of taxes.' " *Id.* at 408-09 (quoting *Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503, 522 (1981)).

No similar circumstances are presented here. Petitioners invoke not the Tax Injunction Act but the Anti-Injunction Act, a statute that speaks only of "injunc-

tion[s]." 28 U.S.C. § 2283; *see Perez v. Ledesma*, 401 U.S. 82, 129 n.18 (1971) (Brennan, J., concurring in part, dissenting in part) (noting "congressional intent that the statutory term 'injunction' in § 2283 not be read to include declaratory judgments"). Moreover, while a declaratory judgment invalidating a state tax implicates significant federalism and comity concerns by threatening to interfere with vital state functions, a declaratory judgment in a dispute among private parties typically does not.

In any event, contrary to petitioners' argument, the Fifth Circuit did not intimate in this case that the federalism and comity concerns underlying the Anti-Injunction Act would *never* bar a district court from issuing a declaratory judgment coupled with a relitigation injunction. The court held only that such relief was permissible in the unusual circumstances of this case, given the confluence of three distinct factors:

- *First*, the Fifth Circuit noted that Royal brought this action "to enforce a prior federal judgment" concerning the scope of its policy coverage, and not "to interfere with the state courts." Pet. App. A16.
- *Second*, the Fifth Circuit noted that Quinn-L, not Royal, "injected new state claims into the federal action" as affirmative defenses to enforcement of the prior federal judgment. *Id.*
- *Third*, the Fifth Circuit noted that "Royal sought relief in federal court nearly six months before the state actions against Royal were filed," and that petitioners commenced the actions in state court only after "significant proceedings" had taken place both in this action and, of course, in the prior declaratory judgment action. *Id.*

It was the combination of these three factors that persuaded the Fifth Circuit that "little, if any, threat to our traditions of comity and federalism" was posed by the district court's deciding all of the claims, issues and de-

fenses presented in the case, and then enjoining their relitigation in state court. *Id.* at A17. Indeed, any contrary result would, as the Fifth Circuit recognized, allow litigants to "defeat[] federal jurisdiction merely by filing a state court action," and thereby engage in wasteful manipulation of the federal and state court systems. *Id.*

Petitioners thus err in asserting (Pet. 26) that the decision below conflicts with *Omaha Property & Casualty Insurance Co. v. Johnson*, 923 F.2d 446 (6th Cir. 1991), and *Tempco Electric Heater Corp. v. Omega Engineering Inc.*, 819 F.2d 746 (7th Cir. 1987). Neither *Omaha Property* nor *Tempco* was brought "to enforce a prior federal judgment." Pet. App. A16. In neither case were the previously unadjudicated issues injected into the declaratory judgment action by the defendant as affirmative defenses. *Id.* And in neither case had "significant proceedings" taken place in the district court before the competing action was even filed. *Id.* There is simply no reason to conclude that, in a case that presented each of these factors, the Sixth and Seventh Circuits would reach a result any different from the Fifth Circuit's result here.[2]

Nor does any conflict exist between this case and *Kidder, Peabody & Co. v. Maxus Energy Corp.*, 925 F.2d

[2] Indeed, the Sixth Circuit recognized in *Omaha Property* that whether a district court may entertain a declaratory judgment action in the face of a related state court action is a matter left to the district court's discretion tempered by considerations of equity, comity and federalism. 923 F.2d at 448. The Sixth Circuit's decision that the district court had abused its discretion in *Omaha Property* turned on two considerations not present here: The state court had already issued an interlocutory ruling on the same matter that was before the district court, and the case involved "a previously undetermined question of state law." *Id.* at 447-48. The Seventh Circuit's decision in *Tempco*, which concerned whether a district court had discretion in a declaratory judgment action to defer to another district court, *see* 819 F.2d at 747, is plainly inapposite. *See Colorado River*, 424 U.S. at 817 (noting difference between "state-federal concurrent jurisdiction and wholly federal concurrent jurisdiction").

556 (2d Cir.), *cert. denied*, 111 S. Ct. 2829 (1991), which likewise presented none of the three factors identified by the Fifth Circuit in this case. Moreover, the Second Circuit's analysis in *Maxus* turned on the fact that the district court had no independent basis of subject-matter jurisdiction over the state-law claims. Instead, the state-law claims were merely pendent to federal claims that had already been disposed of by the district court. *See id.* at 564. No similar circumstances exist here.

Petitioners complain (Pet. 27-28) that the Fifth Circuit's allowing the case to be adjudicated to final judgment is "particularly offensive," because the state court could not proceed during much of that period as a result of the preliminary injunction that was partially reversed in *Royal I*. But the Fifth Circuit found nothing inequitable about such a result in the unique circumstances of this case, precisely because the petitioners themselves had "created this tangled web of litigation by seeking to evade the effect of the first declaratory judgment action." Pet. App. A56. That petitioners, not surprisingly, perceive this result to be unfair to them does not, of course, justify review of this case-specific issue.[3]

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[3] No conflict exists in this regard with *Hayes Industries, Inc. v. Caribbean Sales Assocs.*, 387 F.2d 498, 499-500 (1st Cir. 1968), which prevented a district court from entering a final judgment that could effectively moot the appeal of its preliminary injunction against state court litigation. Here, in contrast, the district court did not enter final judgment until well after the Fifth Circuit's decision in *Royal I*, which could thus be taken into account by both the district court and the Fifth Circuit in considering Royal's request for permanent declaratory and injunctive relief.

Nor does the decision here conflict with *Pyrodyne Corp. v. Pyrotronics Corp.*, 847 F.2d 1398, 1403 (9th Cir.), *cert. denied*, 488 U.S. 968 (1988), which involved a district court's ability to adjudicate precisely the same issues that are pending on appeal. The preliminary injunction issues before the Fifth Circuit in *Royal I* were, as the Fifth Circuit recognized (Pet. App. A9-A10), distinct from the summary judgment issues reviewed in *Royal II*.

In sum, the Fifth Circuit's decision affirming the district court's authority to issue declaratory and injunctive relief in the circumstances of this case is correct and does not conflict with any decision of this Court or of any other court of appeals. Accordingly, no valid reason exists for this Court to review the Fifth Circuit's decision here.[4]

IV. THE COURT OF APPEALS' DECISION THAT THE INVESTOR PETITIONERS ARE BOUND BY THE FIRST DECLARATORY JUDGMENT DOES NOT MERIT THIS COURT'S REVIEW

Petitioners finally contend (Pet. at 11-12, 28-30) that, in affirming the district court's summary judgment determination that the Investors were in privity with Quinn-L and thus could be bound by the earlier declaratory judgment, the Fifth Circuit deprived the Investors of a "due process right to their own day in court." This argument improperly attempts to create a legal issue out of a simple factual issue and is, in any event, erroneous.

Petitioners do not, and cannot, dispute that a judgment may be binding on "a person, although not a party, [who]

[4] The injunction against state court litigation of the waiver, estoppel and negligence claims is also justifiable under the Anti-Injunction Act's "in aid of jurisdiction" exception. 28 U.S.C. § 2283. This Court has recognized that this exception may properly be used "to prevent a state court from so interfering with a federal court's consideration or disposition of a case as to seriously impair the federal court's flexibility and authority to decide that case." *Atlantic Coast Line*, 398 U.S. at 295; *see Capital Serv., Inc. v. NLRB*, 347 U.S. 501, 504-06 (1954). This exception has been invoked by the lower federal courts to protect their ability to adjudicate complex controversies, especially where the court had already rendered a final judgment or otherwise taken charge of the controversy prior to the filing of the state court action. *See, e.g., Battle v. Liberty Nat'l Life Ins. Co.*, 877 F.2d 877, 880-82 (11th Cir. 1989); *United States v. District of Columbia*, 654 F.2d 802, 808-11 & n.16 (D.C. Cir.), *cert. denied*, 454 U.S. 1082 (1981); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 501 F.2d 383, 384 (4th Cir. 1974) (per curiam). This is plainly such a case.

has his interests adequately represented by someone with the same interests who is a party." *Martin v. Wilks*, 490 U.S. 755, 762 n.2 (1989). They merely contend (Pet. 29) that the Fifth Circuit should not have allowed the district court to decide the privity question on summary judgment, ostensibly because "the summary judgment evidence . . . raises a factual dispute on the privity question" that supposedly was not addressed by the district court. It is thus evident that petitioners' "due process" claim is, in reality, nothing more than a routine challenge to the district court's decision to grant summary judgment on the particular record of this case. This Court's resources are not appropriately addressed to such fact-specific challenges.

In all events, contrary to petitioners' unsupported suggestion, both the district court and the Court of Appeals reviewed the evidence on the privity issue. The Fifth Circuit's conclusion, on *de novo* review of the record, that "[t]here is no material issue of fact as to privity" between the Investors and Quinn-L is correct. Pet. App. A22. Quinn-L's interest in establishing insurance coverage in the first declaratory judgment action was identical to the Investors' interest. Moreover, at the time that the first declaratory judgment action was being litigated, Quinn-L and the Investors had already established a cooperative relationship. For example, the Investors had entered into a settlement agreement with Quinn-L's principal, Mr. Lovell, which required him to provide "assistance and cooperation" to the Investors. *See id.* at A26-A27. The Investors and Quinn-L had even represented to the court in the first declaratory judgment action that they had reached an "agreement in principle for settlement of the Quinn-L Litigation" and sought the substitution of the Investors' counsel for Quinn-L's existing counsel. R. A-7 Ex. 32 at 2-3. It was thus not contrary to the record evidence, much less a denial of due process, to enter summary judgment on the issue of privity between Quinn-L and the Investors. This fact-bound ruling, like the other

rulings challenged by petitioners, does not merit this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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